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Notes

Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child

by

ELIZABETH A. DELANEY*

"No human bond is cemented with greater strength
than that of parent and child."¹

Within the last eighteen months, the California Court of Appeal has decided two important family law cases that will have far reaching effect on the lives of nontraditional families throughout the State. The court held in *Curiale v. Reagan*² and *Nancy S. v. Michele G.*³ that only the biological or adoptive mother has the status of "legal parent" when a lesbian couple decides to have a family and raise a child. The biological mother's lesbian partner is not considered a legal parent of the child that the couple raises together because she does not have a biological or adoptive link to the child.⁴ These cases demonstrate that without the status of "legal parent" the lesbian partner will have virtually no success pursuing child custody and visitation actions if her relationship with the biological mother ends.⁵

The formation of nontraditional families by gay couples is dramatically on the rise.⁶ Child custody and visitation lawsuits inevitably result

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1. *Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 357, 703 P.2d 88, 89, 216 Cal. Rptr. 748, 749 (1985).

2. *Curiale v. Reagan*, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990).

3. *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991).

4. *Id.* at 836, 279 Cal. Rptr. at 215; *Curiale*, 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522.

5. See, e.g., *Nancy S.*, 228 Cal. App. 3d at 837, 838, 840, 279 Cal. Rptr. at 216, 217-18; *Curiale*, 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522.

6. Most recently, one commentator has observed, "At least 1.5 million, perhaps 4 million children nationwide are being raised by gay or lesbian couples. Many were born of prior

when these couples terminate their relationships.⁷ Because the California courts have reached divergent outcomes in dealing with such cases,⁸ the California legislature must settle this area of family law. In order to ensure fair and consistent results upon which lesbian couples⁹ can rely when planning a family, legal recognition of both parents is necessary.¹⁰

heterosexual unions, but about 10,000 babies have been conceived via donor insemination". Leslie Dreyfous, "Divorced" Lesbians and Gays Challenging Legal Definition of a Parent, L.A. TIMES, Apr. 28, 1991, at A39. By an earlier count, "Approximately three million gay men and lesbians in the United States are parents, and between eight and ten million children are raised in gay or lesbian households." Note, *Developments in the Law - Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989) [hereinafter *Developments in the Law*] (citing ABA Annual Meeting Provides Forum for Family Law Experts, 13 Fam. L. Rep. (BNA) 1512, 1513 (1987)). Regardless of their exact number, such nontraditional families are becoming increasingly common. See also Elena M. DiLapi, *Lesbian Mothers and the Motherhood Hierarchy*, 18 J. HOMOSEXUALITY Nos. 1/2 1989, 2+ 101, 103-04 (1989) (estimating that a 43% increase occurred between 1970 and 1980 in families with no man present, that traditional two parent families composed only 36% of households in 1980, that there were over 2 million lesbian mothers in the United States in 1982, and that 1.5 million children were living with lesbian mothers as of 1985); E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271, 278-79 (1985-86) (describing the increasing interest of lesbian and gay communities in creating biologically related families); Jane Gross, *New Challenge of Youth: Growing Up in Gay Home*, N.Y. TIMES, Feb. 11, 1991, at A1 ("There have always been homosexuals who became mothers or fathers in conventional marriages and then reared their children after divorce. But now, more and more, gay men and lesbians are doing it the other way around—first acknowledging their homosexuality and then setting out to form families."); David Margolick, *Lesbian Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, § 1, at 1, 10 (estimating that at least 10,000 children are now being reared by gay women).

7. See Margolick, *supra* note 6, at 1, 10.

8. Compare *Curiale*, 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522 (holding that nonparent in same-sex relationship had no standing to assert claim for custody or visitation) with *Nancy S.*, 228 Cal. App. 3d at 836, 279 Cal. Rptr. at 215 (holding that, while the court had subject matter jurisdiction, the lesbian partner's status did not entitle her to grant of custody) and *Sabol v. Bowling*, No. CF27024 (Cal. Super. Ct., Los Angeles County, Jan. 30, 1989) (permitting nonbiological mother's action for joint custody based on the principles of equitable estoppel) and Reporter's Transcript of Proceedings at 21, *Loftin v. Flournoy*, No. 569630-7 (Cal. Super. Ct., Alameda County, Sept. 4, 1984) (holding nonbiological mother had standing to assert visitation rights under California's principles of "general custody law").

9. This Note focuses on the rights of lesbian parents. Through artificial insemination lesbian women have the option of creating families without bestowing any legal rights upon the sperm donor. See CAL. CIV. CODE § 7005 (West 1983) (treating sperm donor "in law as if he were not the natural father." (emphasis added)). A homosexual male couple, however, needs the assistance of a woman in order to give birth to a child that is biologically linked to one of the men. The addition of a third party in the homosexual male couple scenario raises additional considerations because the child-bearing woman may have legal rights with respect to the child. See, e.g., *In re Baby M.*, 537 A.2d 1227, 109 N.J. 396 (1988). Analysis of the legal rights pertaining to homosexual male families is beyond the scope of this Note.

10. Two commentators recently observed:

If you're a gay or lesbian couple and you want to raise a child, you face a major practical problem: in almost all cases, only one of you'll have the legal rights of a parent. Why? Because only one of you can be the biological parent, or, if you adopt or foster a child, usually only married couples or single people can adopt or become

The benefits of legally and socially recognizing the nonbiological as well as the biological parent would include: legal protection in the areas of child custody and visitation rights;¹¹ protection of the child's economic interests;¹² and protection of the child's psychological well-being.¹³

This Note discusses the legal bases for a nonbiological lesbian parent to obtain standing to sue for child custody and visitation rights. Part I explores recent California decisions that have refused to expand the definition of parent beyond the precise statutory language of the Uniform Parentage Act. Part II examines the existing, yet ineffective, strategies proposed in California by nonbiological, nonadoptive parents in same-sex relationships and explains why the California statutory scheme is a barrier to their success. It compares California's legislation with other states' statutory schemes, which promote more equitable results than those reached by California courts. Part III discusses the need to expand the definition of parent and family in California. The author proposes that the California legislature adopt a broadened definition of legal parent to include a nonbiological, unmarried "parent" who has satisfied certain conditions, even though no biological or adoptive link connects the child to that "parent." She further recommends that the California legislature enact a "second parent" adoption statute. These statutory modifications would produce fair and foreseeable results by allowing qualified nonbiological parents to pursue child custody and visitation actions with-

foster parents. No matter how strong the bonding between the child and the other parent, or "co-parent," the role isn't legally recognized.

HAYDEN CURRY & DENIS CLIFFORD, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* 7:2 (5th ed. 1989). See also *Developments in the Law*, *supra* note 6, at 1655 (noting that "co-parent" may lose custody of child to legal parent in case of a break-up, or to relatives of biological parent in case of death).

11. Legal recognition of the relationship would allow standing for the lesbian partner to pursue child custody and visitation actions and would place the lesbian partner on equal footing with the biological or adoptive parent.

12. By legally recognizing the parent-child relationship, the legislature also would protect the child's future economic interests in child support payments, inheritance rights, social security benefits, and insurance policy benefits.

13. One group of commentators has observed that decisionmakers have been slow to understand and to acknowledge the necessity of safeguarding a child's psychological well-being. While they make the interests of a child paramount over all other claims when his physical well-being is in jeopardy, they subordinate, often intentionally, his psychological well-being to, for example, an adult's right to assert a biological tie. Yet both well-beings are equally important, and any sharp distinction between them is artificial.

JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 4 (1973). These commentators further contend: "Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. Since they do not play the same role in later life, their importance is often underrated by the adult world." *Id.* at 31-32. There appears to be no reason why these reflections upon the importance of continuity in parental relationships should hold any less true merely because a parent is a lesbian and not biologically linked to the child.

out unduly extending such standing to unqualified third parties. Furthermore, these changes would place lesbian partners on equal footing with the natural or adoptive mother by providing them with equal access to the judicial system as well as equal rights to custody of and visitation with their children.

I. The California Courts' Refusal to Expand the Definition of Parent

In recent months the California Court of Appeal twice has been presented with the issue of whether a lesbian partner can be considered a legal parent for purposes of pursuing child custody and visitation actions when she is neither the biological nor adoptive mother of the child.¹⁴ The court's answer to this quandary has been a resounding "no."¹⁵ In both *Curiale v. Reagan* and *Nancy S. v. Michele G.* the court refused to expand the current definition of legal parent to include these lesbian partners and instead deferred such expansion to the California Legislature.¹⁶

A. The *Curiale* Decision

The California Third District Court of Appeal recently held in *Curiale v. Reagan*,¹⁷ that the plaintiff did not have standing to assert a custody or visitation claim against the child's natural mother.¹⁸ The plaintiff, Angela Curiale, and defendant, Robin Reagan, had a live-in relationship from April 1982 until December 1987. Prior to moving in together, the couple discussed the possibility of co-parenting a child.¹⁹ They agreed that Reagan would conceive a child via artificial insemination and that they would both share the responsibilities of raising the child.²⁰ They further agreed that Reagan would stay at home for two to three years with the child and that Curiale would support the family. The child was born in June 1985. Curiale provided the sole financial support for herself, Reagan, the child, and another child of Reagan's from an earlier relationship. Curiale, however, was neither the natural mother, stepmother, nor adoptive mother of the newborn child.

14. *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991); *Curiale v. Reagan*, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990).

15. See *Nancy S.*, 228 Cal. App. 3d at 841, 279 Cal. Rptr. at 215; *Curiale*, 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522.

16. *Nancy S.*, 228 Cal. App. 3d at 841, 228 Cal. Rptr. at 219; *Curiale*, 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522.

17. 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520.

18. *Id.* at 1599, 272 Cal. Rptr. at 521.

19. Appellant's Appendix in Lieu of Clerk's Transcript at 12, *Curiale* (No. C006346) (Declaration of Angela Curiale in Support of Application for Order to Show Cause).

20. *Id.* at 1 (Complaint to Establish De Facto Parent Status/Maternity and for Custody and Visitation).

The couple's relationship ended in December 1987 and Curiale moved out of the household.²¹ The two women entered into a written agreement in which they agreed that both of them would continue to share the physical custody of the child and that Curiale would continue to support Reagan and the child with monthly payments of approximately \$4,000.²² In June 1988 Reagan terminated Curiale's child custody and visitation rights.²³

Curiale filed a complaint to establish de facto parent status/maternity²⁴ and for custody and visitation.²⁵ The trial court granted the defendant's motion to quash the order to show cause and dismissed the complaint on the basis that the plaintiff had no standing to initiate the proceeding.²⁶ The California Court of Appeal affirmed.²⁷

The Court of Appeal held that Curiale, as a nonbiological parent in a same-sex relationship, had no standing to appear before the court. Curiale had attempted to bring an action under California Civil Code section 7015, part of the Uniform Parentage Act,²⁸ to determine that a parent-child relationship existed between herself and the child.²⁹ Section 7015 provides, "Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship."³⁰ Curiale argued that section 7015 afforded her standing as "any interested party." The court firmly rejected this argument, holding that Civil Code section 7015 did not apply to a case in which the identity of the child's natural mother was undisputed.³¹ In so holding, the court strictly adhered to the language of California Civil Code sections 7001 and 7003, which limit the definition of parent to those who are either the natural or the adoptive parents of the child.³² Because it was undisputed that the child's biological mother was Reagan, the court reasoned that Curiale's claim was not within section 7015 because the child could not have two mothers.

21. *Curiale*, 222 Cal. App. 3d at 1599, 272 Cal. Rptr. at 521.

22. Appellant's Appendix in Lieu of Clerk's Transcript at 1-2, *Curiale* (No. C006346).

23. Appellant's Opening Brief at 4, *Curiale* (No. C006346).

24. See *infra* Part II.A. (discussing de facto parenthood).

25. *Curiale*, 222 Cal. App. 3d at 1599, 272 Cal. Rptr. at 521.

26. *Id.* at 1599, 272 Cal. Rptr. at 522.

27. *Id.* at 1601, 272 Cal. Rptr. at 523.

28. CAL. CIV. CODE §§ 7000-7021 (West 1983); see 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 409 (9th ed. 1989).

29. *Curiale*, 222 Cal. App. 3d at 1599, 272 Cal. Rptr. at 522.

30. CAL. CIV. CODE § 7015.

31. *Curiale*, 222 Cal. App. 3d at 1599-1600, 272 Cal. Rptr. at 522.

32. Section 7001 defines the parent-child relationship as "the legal relationship existing between a child and his *natural or adoptive* parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." CAL. CIV. CODE § 7001 (emphasis added). Section 7003 provides the methods for establishing the existence of this relationship:

The court also rejected Curiale's attempt to institute a child custody action under California Civil Code section 4600.³³ Section 4600 provides, "In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper."³⁴ The court held that section 4600 alone does not create subject matter jurisdiction.³⁵ In so holding, the court clearly articulated the currently accepted statutory interpretation of section 4600: section 4600 grants the courts authority to issue custody orders only if there is an underlying proceeding before the court.³⁶

In California the underlying proceedings generally can be categorized into one of the three major bodies of law involving child custody decisions:³⁷ guardianship,³⁸ juvenile dependency,³⁹ and "general cus-

The parent and child relationship may be established as follows:

(1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.

(2) Between a child and the natural father it may be established under this part.

(3) Between a child and an adoptive parent it may be established by proof of adoption.

CAL. CIV. CODE § 7003. For the purposes of this note, biological parent and natural parent are used interchangeably.

33. CAL. CIV. CODE § 4600 (West 1983). Civil Code § 4600 is part of the Family Law Act which was enacted in 1969. The Family Law Act, ch. 1608, § 8, 1969 Cal. Stat. 3314, 3330 (operative Jan. 1, 1970). See *In re B.G.*, 11 Cal. 3d 679, 693, 694-95, 523 P.2d 244, 253, 255, 114 Cal. Rptr. 444, 453, 455 (1974) (For a child's custody to be awarded to a nonbiological parent under § 4600, "[a] court [is] required to render a finding that an award to [a biological] parent would be 'detrimental to the child' and that such an award to a nonparent [is] 'required to serve the best interests of the child.'") (quoting § 4600). The legislature's primary goal in using the "detrimental to the child" language in Civil Code § 4600(c) was to curtail the power of the court to award custody of a child to a nonparent over the parent. 10 WITKIN, *supra* note 28, §§ 116-17. The legislature was attempting to avoid the poor results exemplified by *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966). In *Painter*, an Iowa court awarded custody to the grandparents over the natural father because of disapproval of the father's "Bohemian" lifestyle even though the father was employed, remarried, relatively successful and would have provided a stable environment. *Id.* at 1392, 140 N.W.2d at 154. See also Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 23-28 (1975) (discussing the legislative intent and impact of the Family Law Act); Everette M. Porter & Joseph F. Walsh, *The Evolution of California's Child Custody Laws: A Question of Statutory Interpretation*, 7 SW. U. L. REV. 1, 10-27 (1975) (discussing the legislative history of § 4600).

34. CAL. CIV. CODE § 4600(a).

35. *Curiale*, 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522.

36. *Id.*

37. Brigitte M. Bodenheimer, *The Multiplicity of Child Custody Proceedings - Problems of California Law*, 23 STAN. L. REV. 703, 704 (1971).

38. CAL. PROB. CODE § 1500 (West 1991). A guardian has the care, custody, and control of a child during its minority. *Id.* § 2351. When appointing a guardian over a minor, courts have held that "the right of [legal] parents to retain custody of a child is fundamental, and may be disturbed ' . . . only in extreme cases of persons acting in a fashion incompatible

tody" law.⁴⁰ "General custody" law most frequently applies to custody disputes during divorce proceedings.⁴¹ In addition, other recognized proceedings that provide jurisdiction for the adjudication of custody issues include:⁴² adoption,⁴³ determination of maternity⁴⁴ or paternity,⁴⁵ proceedings to terminate parental rights,⁴⁶ and habeas corpus actions.⁴⁷

As the *Curiale* court noted in its decision, however, *Curiale* could not rely on any of these proceedings to obtain standing to claim custody or visitation rights.⁴⁸ *Curiale* did not seek relief by proceedings for guardianship or termination of parental rights because she intended to seek joint custody and visitation, not to divest Reagan of her parental rights. Juvenile dependency proceedings involve a claim that the biological parent is unfit,⁴⁹ which *Curiale* was not alleging. As the unmarried same-sex partner of the biological parent, divorce proceedings could not apply because two people of the same sex cannot marry in California.⁵⁰

with parenthood." *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 419, 188 Cal. Rptr. 781, 788 (1983) (quoting *In re Carmaleta B.*, 21 Cal. 3d 482, 489, 146 Cal. Rptr. 623, 627, 579 P.2d 514, 518 (1978)).

39. CAL. WELF. & INST. CODE § 300 (West 1984 & Supp. 1991). To declare a minor a dependent child of the court, a petition must be filed with the court. *Id.* § 325. The legislative intent behind § 300 is to provide maximum protection for children who are in some way being harmed or are at risk of being harmed. These harms include, *inter alia*, neglect, sexual or physical abuse, and serious emotional damage as a result of the parent. "[This] protection shall focus on the preservation of the family whenever possible." *Id.* § 300.

40. Bodenheimer, *supra* note 37, at 704.

41. *Id.*; see also CAL. CIV. CODE § 4350 (West 1983). When married couples with children divorce, the underlying marriage dissolution proceeding provides jurisdiction for the adjudication of child custody and visitation issues.

42. See generally Bodenheimer, *supra* note 37, at 704-05 (discussing at least eight separate proceedings in California that provide jurisdiction for the adjudication of child custody issues).

43. CAL. CIV. CODE § 221.10 (West 1982 & Supp. 1991) (providing for the adoption of any unmarried minor child by any adult person, subject to further rules prescribed in the adoption chapter).

44. *Id.* § 7015 (West 1983) (providing that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship").

45. *Id.* § 7006 (West 1983) (allowing a child, a biological mother, or a man presumed to be the child's father to bring an action to determine the existence or nonexistence of a father-child relationship).

46. *Id.* §§ 232-233 (West 1982 & Supp. 1991). Any interested person may petition the court for an order to declare a minor child free from custody and control of its legal parents. *Id.* § 233. A state agency usually commences the proceeding, supplanting the authority of the legal parents due to their alleged inability to care properly for the child. *In re Jacqueline H.*, 21 Cal. 3d 170, 175, 577 P.2d 683, 686, 145 Cal. Rptr. 548, 551 (1978). For the parents, an adverse judgement in the proceeding leads to a permanent severance of the parent-child relationship. *Id.*

47. CAL. PENAL CODE § 1507 (West 1982) (writ of habeas corpus can be utilized by a person who is entitled to custody of a child to regain custody of such child from another party who is not legally entitled to custody).

48. *Curiale v. Reagan*, 222 Cal. App. 3d 1597, 1599-1600, 272 Cal. Rptr. 520, 522 (1990).

49. CAL. WELF. & INST. CODE § 300 (West 1984 & Supp. 1991).

50. CAL. CIV. CODE § 4100 (West 1983). The California legislature has defined marriage

Additionally, under current California law, the lesbian partner cannot adopt the child unless the biological parent of the same gender consents and relinquishes her own parental rights.⁵¹ Finally, the current legal definition of parent in California denied Curiale standing to pursue either a habeas corpus proceeding or an action to determine maternity.⁵² Therefore, under California Civil Code section 4600, a nonbiological parent in a same-sex relationship currently is unable to seek child custody unless she attempts to fully divest the biological parent of all her parental rights through a guardianship proceeding or a proceeding to terminate parental rights.

B. The *Nancy S.* Decision

In early 1991 the California First District Court of Appeal in *Nancy S. v. Michele G.*⁵³ also addressed the issue of whether a lesbian partner who was neither biologically nor adoptively linked to a child could be considered a parent of that child within the meaning of the Uniform Parentage Act. The court held that the status of the lesbian partner as a parent-like figure did not entitle her to a grant of custody.⁵⁴ Nancy S. and Michele G. moved in together in 1969 and later that year participated in a private marriage ceremony. After mutually deciding to raise a family together, Nancy S. was artificially inseminated. A daughter, born in 1980, was given Michele G.'s family name and Michele G. was listed on the birth certificate as the father. Four years later, by the same method, Nancy S. bore a son.

In 1985 Nancy S. and Michele G. separated. An agreement was reached in which one child would live with Nancy S. and the other child with Michele G. In addition, the couple arranged a visitation schedule providing for the children to be together four days a week at either Nancy S.'s or Michele G.'s home. This arrangement lasted three years until Nancy S., the birth mother, tried to initiate a new arrangement

as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." *Id.* California law used to describe marriage as a personal relation arising out of a civil contract between two consenting persons. The law was amended in 1977 to clarify that marriage is a contract between a man and a woman. Act of August 17, 1977, ch. 339, § 1, 1977 Cal. Stat. 1295 (amending CAL. CIV. CODE § 4100). This amendment created a legal barrier to same-sex couples entering into a lawfully recognized marriage contract.

51. CAL. CIV. CODE §§ 221.20, 222.76, 221.70 (West 1982 & Supp. 1991). On rare occasions, however, California courts have waived certain statutory provisions to allow joint adoptions by same-sex couples and to allow the lesbian partner to adopt the biological mother's child without divesting the biological mother of her legal rights. *See infra* notes 236-239 and accompanying text.

52. *See infra* notes 29-33 and accompanying text (discussing how Curiale failed to fit the statutory description of legal parent, a requisite for either a maternity or habeas corpus action).

53. 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991).

54. *Id.* at 836, 279 Cal. Rptr. at 215.

wherein each parent would have custody of both children fifty percent of the time. Michele G. resisted this change. As a result, Nancy S. filed a proceeding under the Uniform Parentage Act for a declaration that Michele G., her former lesbian partner, was not a parent of Ms. S.'s offspring.⁵⁵ Nancy S. further requested a declaration that, as the natural mother, she was entitled to sole legal and physical custody of the children and that Michele G. was entitled to visitation only upon her consent. Michele G. cross-complained for custody and visitation, acknowledging that Nancy S. was the birth mother but alleging that she too was a parent of the children. The trial court found in favor of the natural mother. Because Ms. G. did not conform to the statutory definition of parent, the trial court reasoned that it did not have jurisdiction to award her custody or visitation over the objection of the children's biological parent.⁵⁶ Ms. G. appealed.

The California Court of Appeal held that the lower court had jurisdiction under the Uniform Parentage Act to decide whether Ms. G. was a parent of the children.⁵⁷ The appellate court acknowledged that the *Curiale* court had characterized such a situation as a problem of lack of standing and lack of subject matter jurisdiction.⁵⁸ In reaching the merits of the *Nancy S.* case, the court held that jurisdiction is lacking only when a court has no power to adjudicate the subject in dispute.⁵⁹ Since "appellant [Michele G.] has always maintained the position that she was a parent of the child and therefore was entitled to custody and visitation," the court reasoned that the lower court had jurisdiction under the Uniform Parentage Act to determine whether Ms. G. was a parent.⁶⁰ The court never addressed the standing issue. After determining that it had subject matter jurisdiction to hear the claims, the court then addressed the merits of Michele G.'s cross-complaint. Because Michele G. did not dispute that she was neither the children's natural nor adoptive parent, the court of appeal concluded that the trial court correctly determined that Michele G. could not establish a parent-child relationship under the Uniform Parentage Act.⁶¹ Michele G. argued, however, that the Uniform Parentage Act did not provide the only definition of parent. Instead, relying on several legal theories, she argued that she had acquired "pa-

55. *Id.* at 834, 279 Cal. Rptr. at 214.

56. *Id.* at 835 n.2, 279 Cal. Rptr. at 215 n.2.

57. *Id.*

58. *Id.* Actually, the *Curiale* court had held that Civil Code section 7015 was *inapplicable* in cases where it was undisputed who was the natural mother. The court further held that since Civil Code section 4600 does not create subject matter jurisdiction, jurisdiction to adjudicate custody depends upon an underlying proceeding before the court. Because *Curiale* had no standing to pursue any underlying proceeding, she had no means of pursuing a child custody or visitation action.

59. *Id.*

60. *Id.*

61. *Id.* at 836, 279 Cal. Rptr. at 215.

rental rights" to seek custody of and visitation with the children.⁶² Furthermore, Michele G. contended, these "parental rights" enabled her to seek custody and visitation on equal footing with the natural mother, as if the dispute was between two legally recognized parents.

The court of appeal analyzed each theory at length, but ultimately determined that these alternatives did not provide Michele G. with status equal to that of a legal parent.⁶³ The court emphasized the importance of deference to the legislature "in matters involving complex social and policy ramifications far beyond the facts" of the instant case.⁶⁴

C. Reconciling *Curiale* and *Nancy S.*

While the factual situations and final outcomes of *Nancy S.* and *Curiale* are similar, the courts' handling of the standing issue provides a notable legal distinction. In *Nancy S.* the court concluded that it had subject matter jurisdiction under the Uniform Parentage Act to determine the parental status of the former lesbian partner. In contrast, the *Curiale* court held that the Uniform Parentage Act was inapplicable. Instead, the court held that since Civil Code section 4600 did not provide independent subject matter jurisdiction, *Curiale* was without recourse to pursue a child custody or visitation action because she had no standing to avail herself of the necessary underlying proceeding. The cases can possibly be reconciled on the ground that, in *Curiale* the nonbiological lesbian parent instituted the action to determine parentage,⁶⁵ while in *Nancy S.* the biological mother filed the action for a declaration that the lesbian partner was not the children's parent.⁶⁶ Since *Nancy S.* was the children's legally recognized parent, she had standing to pursue her action declaring Michele G. a nonparent under section 7015. This action was an underlying proceeding for section 4600 purposes. *Curiale*, however, by not fulfilling the definition of a legal parent, was unable to pur-

62. Michele G. proposed the legal theories of: de facto parenthood, *in loco parentis*, parenthood by equitable estoppel, and equitable parenthood. *Id.* at 836, 838-40, 279 Cal. Rptr. at 216-18.

63. *Id.* at 841, 279 Cal. Rptr. at 219. The court held that the theory of de facto parenthood did not confer upon Michele G. the same rights as a legal parent to seek child custody and visitation. *Id.* at 837, 279 Cal. Rptr. at 216. The court dismissed the use of the theory of *in loco parentis*, refusing to extend the concept to give a nonparent the same rights as a legal parent in seeking child custody and visitation. *Id.* at 838, 279 Cal. Rptr. at 217. Since the doctrine of parenthood by equitable estoppel is rooted in the presumption that a child born to a married woman is a child of the marriage, the court rejected the use of the theory since the presumption did not apply in the instant case. *Id.* at 839-40, 279 Cal. Rptr. at 218-19. Finally, the court, citing an earlier California case, refused to adopt the concept of equitable parenthood due to the "complex practical, social and constitutional ramification" such an expansion would entail. *Id.* at 840, 279 Cal. Rptr. at 218-19.

64. *Id.* at 841, 279 Cal. Rptr. at 219.

65. *Curiale v. Reagan*, 222 Cal. App. 3d 1597, 1599, 272 Cal. Rptr. 520, 521 (1990).

66. *Nancy S.*, 228 Cal. App. 3d at 834, 279 Cal. Rptr. at 214.

sue an action to determine the existence of a parent-child relationship under the Uniform Parentage Act. Lacking standing to pursue any underlying proceeding, Curiale was unable to pursue her child custody and visitation claims under California Civil Code section 4600. Thus, current California precedent permits only the biological mother to institute an action challenging the parental status of the nonbiological lesbian partner. After *Curiale*, the lesbian partner is unable to assert her own action to determine the existence of a parent-child relationship under Section 7015. Civil Code section 4600 is thus also of no use, because the nonbiological partner lacks standing to pursue the requisite underlying proceeding. This result appears particularly unfair because it allows one party access to the judicial process while denying a similarly situated party the same rights.

Under *Curiale* and *Nancy S.*, even if a court addresses a lesbian partner's claims for child custody and visitation, the lesbian partner's parental status is not commensurate with that of the natural or adoptive mother. In short, the California Court of Appeal refuses to recognize these lesbian partners as legal parents without a biological or adoptive link to the child. The legacy of *Curiale* and *Nancy S.* is disheartening: children who have been raised by two loving parents will be denied the opportunity to maintain a close relationship with the nonbiological parent, if the legally recognized parent so desires.

II. The Battle to Acquire Legal Parent Status

Child custody and visitation is a crucial issue that must be resolved after the termination of a same-sex couples' relationship. The most widely recognized theories that nonbiological parents use in their attempt to gain standing to fight for these child custody and visitation rights are *de facto* parenthood, standing *in loco parentis*, and equitable parenthood. These theories also are asserted by lesbian partners brought into court by the biological mother. The lesbian partner claims her status as either a *de facto* parent, a person standing *in loco parentis*, or equitable parent entitles her to seek custody and visitation on equal footing with the children's natural mother.

While sometimes used interchangeably, these three theories differ in that they are rooted in various aspects of law and psychology. *De facto* parenthood is derived from psychological parenthood⁶⁷ and has historically been used by foster parents to intervene in dependency hearings.⁶⁸ The theory of *in loco parentis* developed in the context of torts, "to impose upon persons 'standing in loco parentis' the same rights and obliga-

67. See *infra* note 73; GOLDSTEIN et al., *supra* note 13, at 17.

68. *Nancy S.*, 228 Cal. App. 3d at 837, 270 Cal. Rptr. at 216.

tions imposed by statutory and common law."⁶⁹ Equitable parenthood is based in the theories of equitable estoppel and equitable adoption.⁷⁰

The success of each theory depends primarily on two factors: the state courts' interpretation of the statutory definition of "parent"; and the state's individual statutory scheme, which determines whether a nonparent can initiate a custody suit without an underlying proceeding already before the court.

The following discussion illustrates the interplay between different states' judicial decisions, statutory schemes, and theories of parenthood. California's results are compared with results in other states. The discussion recognizes that lesbian women often are left without legal recourse because their relationships and families lack the legal protection of marriage.

A. De Facto Parenthood

De facto is a phrase used to characterize a situation which is somehow defective for reasons of form, but which must be accepted for all practical purposes.⁷¹ De facto parenthood describes a parent-child relationship that, though illegitimate for failure to conform to certain procedural rules, for all intents and purposes exists in fact if not in law.⁷² Parties who fall outside the statutory definition of legal parent, but who consider themselves to be a child's parent, frequently allege de facto parenthood in actions involving child custody and visitation.

(1) California

A de facto parent consistently has been defined in California as "a person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."⁷³ In California, the first documented case granting cus-

69. *Id.* at 838, 279 Cal. Rptr. at 217.

70. See *infra* notes 157-158 and accompanying text.

71. BLACK'S LAW DICTIONARY 375 (5th ed. 1979).

72. See, e.g., *Nancy S.*, 228 Cal. App. 3d at 836-37, 279 Cal. Rptr. at 216 (discussing de facto parent status in the context of custody rights).

73. *In re B.G.*, 11 Cal. 3d 679, 692 n.18, 523 P.2d 224, 253 n.18, 114 Cal. Rptr. 444, 453 n.18 (1974) (seminal case frequently cited regarding definition of de facto parent); see also CAL. R. CT. 1401(a)(4) (1991) (defining de facto parent as "a person who has been found by the court to have assumed, on a day to day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period"); GOLDSTEIN et al., *supra* note 13, at 17, 19, 98 (using similar language to define psychological parents). See generally *In re Joshua S.*, 205 Cal. App. 3d 119, 122, 252 Cal. Rptr. 106, 107 (1988) (holding that de facto parent status confers standing in dependency hearings); *Christina K. v. Superior Court*, 184 Cal. App. 3d 1463, 1467, 229 Cal. Rptr. 564, 566-67 (1986) (determining foster parent's status as de facto parent by reference to quality of relationship with child); *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 397, 224 Cal. Rptr. 530, 537 (1986) (biological mother asking court to declare her friend de facto parent of the

tody to a de facto parent over the biological parent was the 1933 case of *Guardianship of Shannon*.⁷⁴ *Shannon* involved a custody dispute between a natural mother and a stepmother for guardianship of two minor children. The trial court appointed the stepmother as guardian, finding that the natural mother "was not a fit, proper, and competent person to be appointed guardian" of her children.⁷⁵ The reviewing court affirmed. In deciding to award the children to the stepmother, the court took several factors into consideration: the children looked upon the stepmother as their mother; the children did not have a close relationship with their natural mother; the children did not want to be separated from their younger half-sister; and removing the children from the stepmother "would mean breaking up an established family and placing said children with a mother who has had little contact with them for five years or more."⁷⁶

Since *Shannon*, California courts consistently have recognized the theory of de facto parenthood in traditional child custody proceeding.⁷⁷ Although recognizing the theory, the courts have been unwilling to equate de facto parenthood with legal parenthood.⁷⁸ The refusal to recognize de facto parenthood as fulfilling the statutory definition of legal parent causes two major difficulties. First, recognition of de facto parent status alone will not confer standing for purposes of a child custody proceeding.⁷⁹ In all reported California cases in which de facto parenthood has been alleged successfully, there have been underlying proceedings that gave the nonbiological parents standing to present their case for custody.⁸⁰ An unmarried lesbian partner who is neither the natural nor

child); *Charles S. v. Superior Court*, 168 Cal. App. 3d 151, 156, 214 Cal. Rptr. 47, 50 (1985) (holding that grandfather was de facto parent); *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 420-21, 188 Cal. Rptr. 781, 789-90 (1983) (holding plaintiffs had become child's de facto parents); *Perez v. Department of Health*, 71 Cal. App. 3d 923, 927, 138 Cal. Rptr. 32, 34 (1977) (holding that grandmother and uncle, as de facto parents, were proper parties to paternity proceedings).

74. 218 Cal. 490 23 P.2d 1020 (1933).

75. *Id.* at 491, 23 P.2d at 1021.

76. *Id.* at 493, 23 P.2d at 1021-22; *see also, In re B.G.*, 11 Cal. 3d 679, 692, 523 P.2d 244, 253, 114 Cal. Rptr. 444, 453 (1974). The *B.G.* court observed:

The fact of biological parenthood may incline an adult to feel a strong concern for the welfare of his child, but it is not an essential condition; a person who assumes the role of parent, raising the child in his own home, may in time acquire an interest in the "companionship, care, custody and management" of that child. The interest of the "de facto parent" is a substantial one, recognized by the decision of this court in *Guardianship of Shannon* and by courts of other jurisdictions and deserving of legal protection.

Id. (footnotes and citations omitted).

77. *See supra* note 73 (collecting cases).

78. *See infra* note 85 (collecting cases).

79. *See supra* notes 24-53 and accompanying text (discussing *Curiale* decision).

80. *See Nancy S. v. Michele G.*, 228 Cal. App. 831, 834, 279 Cal. Rptr. 212, 214 (1991) (biological mother's action for declaration that lesbian partner was not a parent of children

adoptive mother of the child will not have access to necessary underlying proceedings which provide standing.⁸¹ Without an underlying proceeding, the nonbiological parent is powerless to get into court to present her evidence. Consequently, the theory of de facto parenthood offers no relief to a lesbian partner who, having neither a biological nor an adoptive link to the child, seeks standing to assert custody over the child of a longterm relationship.⁸²

The second difficulty stemming from the courts' refusal to equate de facto and legal parent status is that recognition of de facto parent status will not place the lesbian partner on equal footing with the natural or adoptive mother. In *Nancy S. v. Michele G.*, the court acknowledged that Michele G. might be entitled to status as a de facto parent.⁸³ However, the appellate court specifically held that, even though a lesbian partner may be granted de facto parent status, this status does not entitle her to "the same rights as a parent to seek custody and visitation over the objection of the children's natural mother."⁸⁴ Furthermore, the court noted that no cases supported the contention that de facto parents can seek custody according to the same standards that are utilized in a dispute between two legal parents.⁸⁵ The de facto parent must show by

provided underlying proceeding for lesbian partner to allege de facto parent status); *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 397, 224 Cal. Rptr. 530, 537 (1986) (court determined that declaration of de facto parent status to female friend of biological mother during proceeding initiated by semen donor to establish paternity and visitation rights was premature); *In re Batey*, 15 Fam. L. Rep. (BNA) 1356 (Cal. Super. Ct. 1987) (awarding child custody and guardianship to nonbiological "parent" who was homosexual partner of deceased biological father over claims of child's biological mother during guardianship proceedings). *But cf. Loftin v. Flournoy*, No. 569630-7 (Cal. Super. Ct., Alameda County, Sept. 4, 1984), cited in *Shapiro & Schultz*, *supra* note 6, at 271 (ordering that nonbiological lesbian partner had right to seek visitation with child whom she and her companion were raising at the time of their separation). Judge Agretellis of the Alameda Superior Court held that "Miss Loftin has standing to pursue her request for visitation under what I find to be the general custody law of this state." *Shapiro & Schultz*, *supra* note 6, at 274 n.15 (citing *Loftin*). The judge went on to add that even though no case or statute directly provided Loftin with this right, it was "embedded in statutes and cases." *Id.* Although the author applauds Judge Agretellis' interpretation of California's general custody law, in light of the court of appeal opinions in *Curiale* and *Nancy S.* it must be admitted that *Loftin* is of no precedential value.

81. See *Curiale v. Reagan*, 222 Cal. App. 3d 1597, 1599-1600, 272 Cal. Rptr. 520, 520-22 (1990).

82. See *infra* notes 228-235 and accompanying text (discussing adoption difficulties for same-sex couples where one of the parents is the biological parent).

83. *Nancy S.*, 228 Cal. App. 3d at 837, 279 Cal. Rptr. at 216.

84. *Id.*

85. *Id.*; see also *In re Jody R.*, 218 Cal. App. 3d 1615, 1627-28, 267 Cal. Rptr. 746, 754 (1990) (holding that de facto parent's role in dependency hearings is limited and that de facto parent is not considered a parent or guardian for purposes of dependency law); *In re Venus B.*, 222 Cal. App. 3d 931, 935, 272 Cal. Rptr. 115, 117 (1990) (distinguishing between a de facto parent and a stepfather for purposes of California Welfare and Institutions Code § 362(c)); *In re Joshua S.*, 205 Cal. App. 3d 119, 122, 252 Cal. Rptr. 106, 107 (1988) (holding grant of de facto parent status does not automatically confer custody, but rather confers standing to allow

clear and convincing evidence that it would be detrimental to the children for the children to remain in the custody of the natural parent.⁸⁶ This "detriment" standard is much more rigorous than the "necessary or proper" standard which is applied in a dispute between two legal parents.⁸⁷

The above discussion explains the reasons why de facto parenthood has failed in California as an alternative parental theory for lesbian partners. De facto parent status is neither an effective method of gaining standing to pursue child custody and visitation actions nor a means to gain equal footing with the legally recognized parent once the dispute is before the court.

(2) *De Facto Parenthood in Other States*

In other states the use and effectiveness of the de facto parent theory has varied, primarily because other state statutes differ and, as a result, so do the respective state courts' interpretations of their respective provisions. The earliest case to award child custody to a de facto parent in a same-sex relationship was the 1977 Colorado case of *In re Hatzpoulos*.⁸⁸ In *Hatzpoulos* the child's biological mother committed suicide, and the state instituted a dependency-neglect proceeding. The state's proceeding gave the mother's partner standing to allege de facto parent status.⁸⁹ Although this case is notable because it recognized the lesbian partner as a de facto parent and subsequently granted custody to the lesbian partner,⁹⁰ courts are likely to limit *Hatzpoulos* to its facts.⁹¹ Furthermore,

assertion of their interest in custody, companionship, care, and management of the child); *In re Jamie G.*, 196 Cal. App. 3d 675, 683-84, 241 Cal. Rptr. 869, 875 (1987) (holding de facto mother had no due process right to reunification services statutorily accorded to natural parents, adoptive parents, and guardians in dependency hearings), *cert. denied*, 488 U.S. 835 (1988).

86. *Nancy S.*, 228 Cal. App. 3d at 837, 279 Cal. Rptr. at 216. California Civil Code § 4600(c) provides:

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.

CAL. CIV. CODE § 4600(c) (West 1983).

87. Thus, in proceedings between two parents "where there is at issue the custody of a minor child, the court may . . . make such order for the custody of the child during minority as may seem *necessary or proper*." CAL. CIV. CODE § 4600(a) (emphasis added).

88. 4 Fam. L. Rep. (BNA) 2075 (Colo. Juv. Ct. 1977).

89. *Id.*

90. See also *In re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 (Fla. Cir. Ct. 1989). In *Pearlman*, a lesbian couple lived together in a monogamous relationship for 13 years, during which time they decided to bear a child through artificial insemination. After the biological mother died, the child lived with her grandparents while the lesbian partner as de facto parent had state-awarded rights of visitation. However, unbeknownst to her, the grandparents instituted adoption proceedings, adopted the child, and then filed for abolition of the de facto parent's

Hatzpoulos (in which the biological mother was dead) is distinguishable from cases in which the nonbiological lesbian parent requests custody over the objections of the biological mother.

In a recent Maryland decision, *A.C.C. v. C.I.D.*,⁹² the court granted visitation rights to the nonbiological lesbian parent of a seven year-old child.⁹³ The lesbian couple had lived together for four years before deciding to parent a child together through artificial insemination. Together they chose a suitable sperm donor. After the child was born, they remained together for four years, after which time the couple separated. The nonbiological parent frequently visited the child for two years after the separation, until the child's natural mother prohibited any further visitation. The nonbiological parent then sued for joint custody and visitation in 1989. The natural mother expressed the fear that, if the court granted the plaintiff any rights at all, it would open the door for babysitters, teachers, and friends to ask for the same rights.⁹⁴ In granting the plaintiff visitation rights, the court reasoned that even though the plaintiff was not a "parent," a "significant relationship" existed and the child's best interests supported a continuation of that relationship.⁹⁵ The plaintiff, while not receiving recognition as a legal parent, was able to maintain her relationship with the child through visitation. However, if the judge had determined that the plaintiff was a legal parent of the child, the issue of custody would also have been addressed. The case appears to limit the definition of legal parent to a biological or adoptive parent, but acknowledges the existence of a "significant relationship" between the child and the nonbiological parent important enough to grant visitation rights.

A different result, although employing a similar limitation upon the definition of legal parent, was reached in the Wisconsin case of *In re*

visitation rights. The court held that, while the Florida adoption statute did not expressly require notice to anyone other than the child's natural parents, since the *de facto* mother had state-awarded visitation rights entitling her to temporary custody, she had a constitutionally protected interest in preserving her family relationship with the child that could not be terminated without notice. The court then awarded legal and physical custody of the child to the lesbian partner. *Id.* at 1355-56.

91. As Paula Ettelbrick, Legal Director of Lambda Legal Defense and Education Fund, Inc., has noted, "In instances in which the biological mother has died, courts seem to be more sympathetic and willing to award custody to the surviving non-biological mother." 7 LAMBDA UPDATE, Winter 1990, at 15.

92. No. 89191039/CE 99919 (Baltimore City Cir. Ct. March 29, 1990), noted in Margolick, *supra* note 6, at 10.

93. *Id.*

94. *Id.*

95. The judge apparently arrived at her decision after consulting with the child in the judge's chambers. *Id.* Fortunately, the child was mature enough to articulate her feelings and convey her desire to continue the relationship with her nonbiological parent.

*Z.J.H.*⁹⁶ There, a lesbian nonbiological parent sought custody and visitation of her former partner's adopted son. The plaintiff based her action on *de facto* parenthood.⁹⁷ The Wisconsin Circuit Court held that the action fell outside the court's statutory authority, which regulated judicial awards of child custody, placement, and visitation.⁹⁸ The court further held that it lacked the authority to enforce a contract between the parties providing for mediation in case of a custody/visitation dispute, because the contract violated the legislative intent of the statute.⁹⁹

Affirming the circuit court's decision, the Wisconsin Court of Appeal concluded that the adoptive mother was the child's sole parent, and that statutory language referring to "minor child of the parties" did not include a *de facto* parent "even when that person has established a close parent-like relationship with the child."¹⁰⁰ The court also held that the Wisconsin Supreme Court's interpretation of the visitation statute, which provides petition options for a person who has maintained a parent-child relationship with the child, did not apply when the family unit was intact and when no underlying action had been filed.¹⁰¹

The varying results obtained in these out-of-state cases depend entirely upon the individual state's statutory scheme and the degree of latitude given to each state court in defining the term "parent." Once a state legislature has set the parameters of the definition, the courts consistently have decided cases in light of the legislative intent.

Even in the best case scenario, where the courts have recognized *de facto* parent status, *de facto* parents are not accorded the same rights as a legal parent. This limited recognition only allows the successful pursuit of a visitation action; it does not afford the lesbian partner the opportunity to pursue joint custody over the legal mother's objection. In order to successfully pursue a child custody action, the *de facto* parent will have to demonstrate that the legal parent is unfit. This is undesirable from the lesbian parent's standpoint for two reasons. First, a showing of unfitness is much more difficult than a showing of either necessary and proper or best interests of the child. Second, it appears that most nonbiological lesbian parents desire joint custody, not a determination that they are entitled to sole custody. *De facto* parenthood thus appears to be an ineffective theory for lesbian parents seeking custody of their children.

96. 157 Wis. 2d 431, 459 N.W.2d 602 (1990), *review granted by* Sporleder v. Hermes, 464 N.W.2d 423 (1990), *and aff'd*, 162 Wis. 2d 1002, 471 N.W.2d 202 (1991).

97. *Id.* at 432, 459 N.W.2d at 603.

98. *Id.* at 433-34, 459 N.W.2d at 603.

99. *Id.*, 459 N.W.2d at 605.

100. *Id.* at 435-36, 459 N.W.2d at 605.

101. *Id.* at 436, 459 N.W.2d at 605.

B. *In Loco Parentis*

The *in loco parentis* doctrine is another method of alleging parenthood often utilized by nonbiological lesbian parents when their status as a parent does not fulfill the precise language of the statutory definition. The argument is that, while the proponent is not the adoptive or biological parent of the child, she is standing in the shoes of a parent and should be accorded the legal rights of a parent.

(1) *California*

A California appellate court has described the concept of *in loco parentis* in the following terms:

[A] person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to legal adoption, . . . stand[s] in loco parentis, and the rights, duties and liabilities of such person are the same as those of the lawful parent.¹⁰²

In California, this doctrine has developed primarily in the area of step-parent-stepchild relationships.¹⁰³ In pursuing a child custody or visitation action, stepparents have at least two distinct advantages over nonbiological parents in a same-sex relationship. First, since they are legally married to the biological parent, they gain standing to the action through the underlying marriage dissolution proceeding. Second, the stepparent can adopt the child without divesting their married partner of their parental rights. Neither of these options is available in a same-sex relationship. With the enactment of California Civil Code section 4351.5,¹⁰⁴ which accords stepparents visitation rights, the need to pursue child custody under the doctrine of *in loco parentis* has been reduced sharply.¹⁰⁵

102. *Loomis v. State*, 228 Cal. App. 2d 820, 823, 39 Cal. Rptr. 820, 822 (1964).

103. See, e.g., *Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985); *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7 (1931), *overruled on other grounds by* *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Perry v. Superior Court*, 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (1980); *Loomis v. State*, 228 Cal. App. 2d 820, 39 Cal. Rptr. 820 (1964).

104. CAL. CIV. CODE § 4351.5 (West Supp. 1991). Section 4351.5 was added in 1982, apparently in response to the court of appeal's invitation to address the "thorny problem of stepparent visitation." *Michelle W.*, 39 Cal. 3d at 368, 703 P.2d at 96-97, 216 Cal. Rptr. at 756 (Bird, C.J., dissenting).

105. Section 4351.5 provides a petition and mediation procedure for stepparent visitation rights during dissolution or annulment proceedings. CAL. CIV. CODE § 4351.5 (West 1983); see also Sandra R. Blair, Comment, *Recent Developments, Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes*, 58 WASH. L. REV. 111, 112 (1982) (arguing that a stepparent should not automatically have standing to seek custody based on an *in loco parentis* relationship, but should have standing to petition the court for custody). However, as Chief Justice Bird pointed out in her dissent in *Michelle W.*, the enactment of the statute did not affect a stepparent's right to pursue an alternative custody action under the *in*

This doctrine had not been raised in any published California custody case involving a nonbiological lesbian parent until 1991 in *Nancy S. v. Michele G.*¹⁰⁶ Unfortunately, the doctrine fails to offer favorable recourse to nonbiological lesbian parents for the same reasons that de facto parenthood has been unsuccessful. The reasons for its failure are two-fold: First, the doctrine will not independently provide subject matter jurisdiction and standing to lesbian partners who are pursuing custody and visitation actions; and second, even if the biological mother files an action for declaratory relief, and thus brings her partner before the court, the courts continuously have refused to equate alternative parental theories with legal parenthood.¹⁰⁷ The doctrine fails to provide standing because the statutory scheme and legislative intent of California Civil Code section 4600 prevent the court's exercise of subject matter jurisdiction without one of the previously described underlying proceedings.¹⁰⁸ Therefore, a lesbian partner of the child's biological mother, alleging *in loco parentis* without an underlying proceeding, is still unable to get into court via section 4600. The California courts also will continue to reject parentage determination actions brought by nonbiological lesbian parents under California Civil Code section 7015 if the nonbiological parent is not a natural or adoptive parent of the child.¹⁰⁹ Finally, the appellate court in *Nancy S.* specifically rejected the doctrine of *in loco parentis* as bestowing upon a nonparent the same rights as a legal parent.¹¹⁰

(2) *The Doctrine of In Loco Parentis in Other States*

As with the theory of de facto parenthood, successful utilization of the *in loco parentis* doctrine is dependent upon the different states' statutes and their respective courts' interpretation of such provisions. As noted in the following discussion, even if the state statutory scheme allows the nonbiological lesbian parent standing to pursue a child custody and visitation action, her status as a person standing *in loco parentis* is not equivalent to the status of the legal, biological parent.

In New York, the possibility of an unmarried, nonbiological parent using the theory of *in loco parentis* to petition for visitation was rejected in *Alison D. v. Virginia M.*¹¹¹ In *Alison D.*, two women lived together as a family unit for five years, mutually planned the pregnancy of the biological mother by artificial insemination, agreed to share equally as co-parents all duties and obligations of raising the child, and agreed to share

loco parentis doctrine. *Michele W.*, 39 Cal. 3d at 369, 703 P.2d at 97, 216 Cal. Rptr. at 757 (Bird, C.J., dissenting).

106. 228 Cal. App. 3d 831, 838, 279 Cal. Rptr. 212, 217 (1991).

107. *Id.*

108. See *supra* notes 33-43 and accompanying text.

109. See *supra* notes 28-32 and accompanying text.

110. *Nancy S.*, 228 Cal. App. 3d at 838, 279 Cal. Rptr. at 217.

111. 155 A.D.2d 11, 552 N.Y.S.2d 321 (1990).

the household and child support expenses.¹¹² Upon the couple's separation, the nonbiological parent petitioned for child visitation rights.

In denying the nonbiological parent's habeas corpus petition, the New York Supreme Court, Appellate Division, held that she was not a "parent" within the meaning of the statute that allowed "either parent" to apply for writ of habeas corpus to determine issues of visitation.¹¹³ The court refused to accept the petitioner's argument that she stood *in loco parentis* to the child and, therefore, was a "parent" within the meaning of the statute.¹¹⁴ The supreme court, relying on *Ronald FF. v. Cindy GG.*,¹¹⁵ succinctly stated "[t]he court declines to adopt the definition of a parent as someone standing in loco parentis."¹¹⁶ In *Ronald FF.* the court had stated that the special circumstances rule of *Bennett v. Jeffreys*¹¹⁷ did not apply to grant visitation rights to a "biological stranger" when the child was in the custody of the fit biological mother.¹¹⁸ The special circumstances rule provides:

[I]ntervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child.¹¹⁹

The *Alison D.* court found no distinction between the labels "*in loco parentis*" and "special circumstances," noting that their legal analyses were essentially the same.¹²⁰ Therefore, in order for the nonbiological parent to gain custody of the child she would need to prove that the natural mother was unfit. This "unfitness" standard requires a higher burden than the best interests of the child standard, which is typically applied in custody disputes between natural or adoptive parents.¹²¹

In *Hughes v. Creighton*¹²² the Arizona Court of Appeals similarly held that an unmarried nonbiological parent standing *in loco parentis* does not fulfill the statutory definition of "parent" in order to achieve standing to seek child visitation rights.¹²³ The case involved a heterosexual couple who lived together as husband and wife but did not marry.

112. *Id.* at 12, 552 N.Y.S.2d at 322.

113. *Id.* at 13, 552 N.Y.S.2d at 322.

114. *Id.*

115. 70 N.Y.2d 141, 511 N.E.2d 75, 517 N.Y.S.2d 932 (1987).

116. *Alison D.*, 155 A.D.2d at 13, 552 N.Y.S.2d at 322.

117. 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976), *appeal sub nom.* *Bennett v. Marrow*, 51 A.D.2d 544 399 N.Y.S.2d 697 (1977).

118. *Ronald FF.*, 70 N.Y.2d at 142, 511 N.E.2d at 76, 517 N.Y.S.2d at 932.

119. *Bennett*, 40 N.Y.2d at 549, 356 N.E.2d at 283, 387 N.Y.S.2d at 827.

120. *Alison D.*, 155 A.D.2d at 11, 552 N.Y.S.2d at 324.

121. *Id.* at 13, 552 N.Y.S.2d at 322.

122. 165 Ariz. 265, 798 P.2d 403 (1990).

123. *Id.* at 269, 798 P.2d at 406.

Prior to living together, but while they were dating, Creighton became pregnant and informed Hughes that he was the father. After their subsequent break-up, a paternity test determined that Hughes was not the natural father. Hughes then attempted to bring an action seeking child visitation rights. In deciding whether Hughes was a parent for purposes of visitation, the court strictly construed the language of the child custody statute "according to the common and approved use of the language unless the words have acquired a particular and appropriate meaning in the law."¹²⁴ The court determined that the common usage of "parent" referred to someone who either biologically had produced or legally had adopted the child.¹²⁵ Since Hughes was neither the child's biological nor adoptive father, he was not a "parent" and, thus, was denied visitation.

Though the results reached in *Hughes* and *Curiale* are similar in that the court refused standing based on the statutory definition of parent, there are crucial differences. First, Hughes and Creighton were a heterosexual couple who had the legal right to marry if they so chose. Curiale and Reagan did not have this choice. Second, once married, Hughes would have had the option of adopting Creighton's child through the statutory procedure of stepparent adoption. This opportunity is not available to lesbians, as they legally cannot marry. Third, during marriage dissolution proceedings, Hughes would have standing to seek child custody under the Arizona statute as a stepparent, even though he was not the natural father of the child.¹²⁶ Once again, this option is not available to same-sex couples because they cannot legally marry or divorce. Finally, since Hughes and Creighton did not marry and only lived together after the birth of the child, the couple probably did not mutually decide to have a child and start a family together. This is evidenced by the existence of an actual, even if unidentified, natural father. The *Curiale* case is distinguishable. Curiale and Reagan mutually decided to raise a child, and Reagan was legally artificially inseminated. No other legal natural parent existed, as in *Hughes*.

The comparison between *Hughes* and *Curiale* further highlights the injustice and inequity of the legal system's failure to offer legal recognition to nonbiological, nonadoptive lesbian parents in same-sex relationships. The *Hughes* decision appears equitable because prior to the relationship's break-up, Hughes, as a heterosexual, had at least two options available to legalize his relationship with the child: marriage or adoption. Curiale, as a lesbian partner in a same-sex relationship had neither of these options. Especially poignant is the fact that lesbian wo-

124. *Id.*

125. *Id.*

126. ARIZ. REV. STAT. ANN. § 25-337 (1991); see *Bryan v. Bryan*, 132 Ariz. 353, 645 P.2d 1267 (1982) (holding that stepparent standing *in loco parentis* was "noncustodial parent" for purpose of visitation statute).

men, such as Curiale and Reagan, carefully plan their families together prior to the birth of any children and, thus, express their desire to parent a family together. In a legally sanctioned stepparent situation, however, the stepparent had no influence or interest in the birth of the stepchildren. The stepparent's interest in the family comes later, after the birth of the children.

It is interesting to note, therefore, that during dissolution proceedings, many states allow a nonadoptive stepparent standing *in loco parentis* to seek custody of the biological parent's children.¹²⁷ The most prominent and frequently cited case in this regard is *Gribble v. Gribble*.¹²⁸ In *Gribble* the Utah court drew a distinction between being a stepparent and stepparent standing *in loco parentis*. The court noted that, although the stepparent relationship alone did not confer rights or obligations, if the stepparent was standing *in loco parentis*, he would be in a different position, which would bring him within the statute as a natural parent with the same rights and obligations.¹²⁹ The court held that, "whether or not one assumes this status depends on whether that person intends to assume that obligation."¹³⁰

The Washington statutory scheme goes one step further and extends to nonparents the stepparent option of seeking child custody.¹³¹ Under

127. See *Carter v. Brodrick*, 644 P.2d 850, 855 (Alaska 1982) (holding that, when stepparent has assumed *in loco parentis* status, stepchild is a child of the marriage for purposes of granting jurisdiction to determine custody); *Klipstein v. Zalewski*, 230 N.J. Super. 567, 574-75, 553 A.2d 1384, 1388 (1988) (holding that stepparent can seek visitation during dissolution proceedings by alleging *in loco parentis* status); *Gribble v. Gribble*, 583 P.2d 64, 68 (Utah 1978) (entitling stepfather to hearing to determine whether he stood *in loco parentis* to stepchild and, if so, whether it was in child's best interest to grant visitation); *In re Marriage of Allen*, 28 Wash. App. 637, 644-45, 626 P.2d 16, 20 (1981) (concluding that stepparent *in loco parentis* has standing to seek custody during marriage dissolution).

In other states, stepparent visitation statutes grant more rights to stepparents, with no allegation of *in loco parentis* necessary. See, e.g., *Evans v. Evans*, 302 Md. 334, 343-44, 488 A.2d 157, 162 (1985) (granting nonadoptive stepmother visitation in accordance with state statute; *in loco parentis* status not necessary); *Fisher v. Fisher*, 99 Nev. 762, 764, 670 P.2d 572, 573 (1983) (holding that ex-stepparent has statutory standing to seek guardianship of child as a concerned person).

128. 583 P.2d 64 (Utah 1978). For cases relying on *Gribble*, see *Charter v. Brodrick*, 644 P.2d 850, 853 (Alaska 1982); *Bryan v. Bryan*, 132 Ariz. 353, 358, 645 P.2d 1267, 1272 (1982); *Perry v. Superior Ct.*, 108 Cal. App. 3d 480, 486, 166 Cal Rptr. 583, 586 (1980); *Simpson v. Simpson*, 586 S.W.2d 33, 36 (Ky. 1979); *Evans v. Evans*, 302 Md. 334, 343, 488 A.2d 157, 161 (1985); *Fisher v. Fisher*, 99 Nev. 762, 764, 670 P.2d 572, 573 (1983); *Klipstein v. Zalewski*, 230 N.J. Super. 567, 571, 553 A.2d 1384, 1386 (1988); *Paquette v. Paquette*, 146 Vt. 83, 88, 499 A.2d 23, 28 (1985).

129. *Id.* at 66.

130. *Id.*

131. A nonparent is distinct from a stepparent, in that the latter benefits from the marriage relationship with a biological parent, but the former is a live-in companion such as a lesbian partner or boyfriend.

Revised Code of Washington section 26.10.030(1),¹³² a custody proceeding can be initiated "by a person other than a parent . . . , but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian."¹³³ In *In re Dombrowski*,¹³⁴ a Washington court held that the statute provided that the male live-in companion of the biological mother had standing to seek custody as a nonparent.¹³⁵ The court reiterated the Washington legislature's intent to allow custody petitions by nonparents and added that parental rights remained protected due to the requirement that the petitioner had to allege that the child was not in the physical custody of the mother or that neither parent would be a suitable custodian.¹³⁶

The Alaska court recently interpreted its state's custody statutes as conferring standing on nonparents to assert claims for custody as long as the nonparent has a "significant connection" to the child.¹³⁷ In *Buness v. Gillen*, the Supreme Court of Alaska tackled the issue of whether a nonparent could invoke the court's jurisdiction to bring a child custody action against the biological parent.¹³⁸ The court held that Alaska Statute section 25.20.060,¹³⁹ which mentions only "parents," did not intend to exclude from the superior court's jurisdiction custody disputes between parents and nonparents.¹⁴⁰ Furthermore, the court held that a nonparent with a "significant connection" with the child has standing to pursue a custody action.¹⁴¹

The *Buness* court relied on an earlier *in loco parentis* case, *Carter v. Brodrick*,¹⁴² which had held that if a stepparent stood *in loco parentis* to the stepchild, the child was "a child of the marriage" for purposes of the custody statute.¹⁴³ In *Buness* the court followed *Carter* and extended jurisdiction from stepparents to nonparents by determining that the legislature had "anticipated and granted" jurisdiction for custody and visitation suits in a "variety of situations where biological parentage is not a determinative factor of jurisdiction."¹⁴⁴ The court also acknowledged that the statutes recognized that the child's psychological as well as bio-

132. WASH. REV. CODE § 26.10.030(1) (1987).

133. *Id.*

134. 41 Wash. App. 753, 705 P.2d 1218 (1985).

135. *Id.* at 757, 705 P.2d at 1221.

136. *Id.*

137. *Buness v. Gillen*, 781 P.2d 985, 988 (Alaska 1989).

138. *Id.* at 987.

139. The statute reads in pertinent part, "If there is a dispute over child custody, either parent may petition the superior court for resolution of the matter" ALASKA STAT. § 25.20.060 (1990) (emphasis added).

140. *Buness*, 781 P.2d at 988.

141. *Id.*

142. 644 P.2d 850 (Alaska 1982).

143. *Id.* at 855.

144. *Buness*, 781 P.2d at 987.

logical relationships were important and, thus, needed protection to ensure the best interests of the child.¹⁴⁵

After the *Buness* court determined the jurisdiction and standing issues, it articulated an additional factor that the superior court should consider when settling custody disputes between biological and nonbiological parents: the nonparent must show by a preponderance of the evidence that custody to the biological parent would be detrimental to the child.¹⁴⁶ The effect of the Alaska decisions is to allow standing to nonparents when there is a significant connection to the child, but additionally to compel a showing of the higher "detriment" standard. Thus, while a lesbian partner has easier access to an Alaskan court, she is required to show by a preponderance of the evidence that the biological parent is " 'unfit, had abandoned the child, or that the welfare of the child requires that [the] non-parent receive custody.' " ¹⁴⁷ This more difficult requirement of showing detriment is undesirable and demonstrates that the lesbian partner standing *in loco parentis* still is not on equal footing with the biological parent.

Oregon has the best articulated statute that allows persons who have established emotional ties to a child through a child-parent relationship to intervene in child custody cases.¹⁴⁸ Oregon Revised Statute section 109.119(1) provides:

Any person including but not limited to a foster parent, stepparent, grandparent or relative by blood or marriage who has established emotional ties creating a child-parent relationship with a child . . . may petition . . . for an order providing for custody or placement of the child or visitation rights or other generally recognized rights of a parent or person in loco parentis.¹⁴⁹

The statute does not confer any substantive custody rights, but rather it affords the individual the right to petition or intervene.¹⁵⁰ The legislative intent behind the statute was to allow the courts to incorporate all relevant information about the existence of such a relationship into the decisionmaking process, thereby most effectively serving the child's best interests.¹⁵¹ With regard to custody disputes between natural parents and nonparents, the Supreme Court of Oregon has held that "a natural parent has the right to the custody of his or her children, absent a compelling reason for placing the children in the custody of another."¹⁵² This, in effect, means that in Oregon the "best interests of the child"

145. *Id.*

146. *Id.* at 989 & n.7.

147. *Id.* at 989 (quoting *Turner v. Pannick*, 540 P.2d 1051, 1055 (Alaska 1975)).

148. OR. REV. STAT. § 109.119(1) (1989).

149. *Id.* The statute also defines the necessary child-parent relationship that must be alleged and requires that such relationship be of at least one year duration. *Id.* § 109.119(4)-(5).

150. *In re Hruby*, 304 Or. 500, 512, 748 P.2d 57, 64 (1987).

151. *Id.* at 512-14, 748 P.2d at 64.

152. *Id.* at 510, 748 P.2d at 63.

standard used in custody disputes between natural parents during dissolution proceedings does not apply to custody disputes between a natural parent and another person.¹⁵³ In articulating the "compelling reason" standard to be used in custody disputes between a parent and a nonparent, the court emphasized that, in such disputes, the major concern was not maximizing the child's welfare but determining whether the child would receive adequate love and care from its natural parent.¹⁵⁴

Since the Oregon Supreme Court's *Hruby* decision, however, section 109.119(1) has been amended to include the following additional sentence:

If the court determines that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child.¹⁵⁵

Whether this additional sentence affects the "compelling reason" standard applied to nonparents remains unclear, as the issue has not been put before the court. The Supreme Court of Oregon has noted, however, that "it would never be proper to give custody to someone *other* than a natural parent unless custody in the other person best served the child's interests."¹⁵⁶

The phrase "is appropriate in the case" will most likely be interpreted in light of the courts' historical preference for granting custody to "parents" over nonparents. Such an interpretation will be useless to nonbiological lesbian parents unless the court is willing to characterize their status as equivalent to that of the legal parent and finds it appropriate to award joint custody in such a circumstance.

Even if the lesbian partner attains standing to pursue an action for child custody and visitation through the use of the *in loco parentis* doctrine, this achievement is only half the battle. In all states, with the possible exception of Oregon, the nonbiological lesbian partner will be required to show the higher "detriment" standard in order to gain custody over the legal parent's objections. This is true even if the lesbian parent does not desire sole custody and wishes to share custody with the legal parent.

C. Equitable Parenthood

An equitable parent is a person who is not the biological parent of the child, but who desires such recognition, is willing to accept the obli-

153. *Id.*

154. *Id.* at 511, 748 P.2d at 63.

155. OR. REV. STAT. § 109.119(1) (1989).

156. *Hruby*, 304 Or. at 516 n.9, 748 P.2d at 66 n.9.

gations of supporting the child and in return wants the "reciprocal rights" of custody and visitation.¹⁵⁷ Although the terms equitable parent and de facto parent are sometimes used interchangeably, they have different origins. Equitable parenthood is grounded in the theories of equitable estoppel and equitable adoption,¹⁵⁸ while de facto parenthood is rooted in the definition of psychological parent.¹⁵⁹

Equitable estoppel is the doctrine that a person may be precluded by his actions, conduct, or silence when he is obligated to speak, from asserting a right that he otherwise would have possessed.¹⁶⁰ Fundamental fairness prevents a party from benefitting from prior inconsistent conduct upon which others have relied to their detriment.¹⁶¹ In the family law context, this doctrine primarily has been used to prevent husbands from denying paternity as a method of avoiding child support payments.¹⁶² Equitable adoption refers to a situation in which an oral contract to adopt a child is fully performed, and even though it lacks full compliance with the applicable adoption statute, the child is considered legally adopted for inheritance purposes.¹⁶³

(1) California

The doctrine of equitable estoppel was raised in the paternity area of family law in the 1961 case of *Clevenger v. Clevenger*.¹⁶⁴ *Clevenger* involved the question of whether a husband owed a duty of support to his

157. *Atkinson v. Atkinson*, 160 Mich. App. 601, 610, 408 N.W.2d 516, 520 (1987).

158. *Id.* at 604, 609-10, 408 N.W.2d at 517, 519-20.

159. See *supra* note 73 and accompanying text (noting that de facto parenthood is rooted in the definition of psychological parent); see also GOLDSTEIN et al., *supra* note 13, at 17.

160. BLACK'S LAW DICTIONARY 483 (5th ed. 1979) (citing *Mitchell v. McIntee*, 15 Or. App. 85, 88, 514 P.2d 1357, 1359 (1973)). Four elements must be present to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his injury. *In re Szwed*, 221 Cal. App. 3d 1403, 1415-16, 271 Cal. Rptr. 121, 129 (1990) (citing *Driscoll v. City of Los Angeles*, 67 Cal. 2d 297, 305, 431 P.2d 245, 250, 61 Cal. Rptr. 661, 666 (1967)).

161. *In re Valle*, 53 Cal. App. 3d 837, 840, 126 Cal. Rptr. 38, 41 (1975).

162. See, e.g., *In re Johnson*, 88 Cal. App. 3d 848, 152 Cal. Rptr. 121 (1979) (applying estoppel to husband who had represented himself as father of his wife's illegitimate child); *In re Valle*, 53 Cal. App. 3d 837, 126 Cal. Rptr. 38 (1975) (applying estoppel to husband who had represented himself as father of his niece and nephew); *Clevenger v. Clevenger*, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961) (refusing to apply estoppel to husband who had not represented himself to the child as the child's natural father); *Johnson v. Johnson*, 93 Mich. App. 415, 286 N.W.2d 886 (1979) (estopping plaintiff from denying paternity when he had represented himself as father). But see *Berrisford v. Berrisford*, 322 N.W.2d 742 (Minn. 1982) (refusing to apply estoppel to prevent husband from denying paternity through blood tests).

163. BLACK'S LAW DICTIONARY 482 (5th ed. 1979) (citing *Barlow v. Barlow*, 170 Colo. 465, 472, 463 P.2d 305, 308 (1969)).

164. 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961).

wife's illegitimate child.¹⁶⁵ The court held that the husband would be estopped from denying the paternity of the child in order to avoid paying child support if: the husband represented to the child that he was the natural father; the husband intended his representation to be accepted and acted upon; the child relied upon the representation; and the child was ignorant of the true facts.¹⁶⁶ The court restricted its holding by requiring that the husband expressly or by implication represent himself as the true father to the child and that the representation must be of such long duration that it frustrates the child's opportunity to discover his true father.¹⁶⁷

The Clevenger holding laid the foundation for the decision reached in the 1975 case of *In re Valle*.¹⁶⁸ The *Valle* court held that the husband, in treating his niece and nephew as his own children, was estopped from denying paternity and thereby avoiding child support payments.¹⁶⁹ The husband argued that, because of the lack of an "actual" parental relationship, the trial court did not have jurisdiction to rule on the matters of custody and support.¹⁷⁰ Responding to this argument, the court relied on *Clevenger* and reasoned, "we perceive no good reason why the trial court should not have jurisdiction to award child custody when the parenthood is established by estoppel and when the issue is fairly and properly litigated with both parties present."¹⁷¹

Although the court's response would appear to offer a legal remedy to a nonbiological lesbian parent seeking standing to sue for child custody and visitation, a critical distinction must be recognized. In *Valle*, the court had jurisdiction over the issue of child custody through the underlying marriage dissolution proceeding which was before the court. An unmarried nonbiological parent, such as Curiale, would still remain unable to initiate a child custody proceeding without an underlying action.¹⁷²

Furthermore, the California Court of Appeal specifically refused to extend the reasoning in the *Valle* decision to cases in which the nonbiological lesbian parent is seeking child custody and visitation over the objection of the biological parent.¹⁷³ In *Nancy S. v. Michele G.*, the court rejected the use of parenthood by equitable estoppel, noting that it had

165. *Id.* at 662, 11 Cal. Rptr. at 708.

166. *Id.* at 671, 11 Cal. Rptr. at 714.

167. *Id.* at 674-75, 11 Cal. Rptr. at 716-17.

168. 53 Cal. App. 3d 837, 126 Cal. Rptr. 38 (1975).

169. *Id.* at 842, 126 Cal. Rptr. at 42. The Valles were raising their niece and nephew because the biological parents had died.

170. *Id.* at 843, 126 Cal. Rptr. at 42.

171. *Id.* at 842, 126 Cal. Rptr. at 42 (emphasis in original).

172. See *supra* notes 28-52 and accompanying text (discussing the legislative intent and limitations of California Civil Code §§ 4600 and 7000-7021).

173. See *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 839 & n.6, 279 Cal. Rptr. 212, 218 & n.6 (1991).

"never been invoked in California against a natural parent for the purpose of awarding custody and visitation to a nonparent."¹⁷⁴ The court distinguished *Valle* from the instant case by first noting that in *Valle* neither the husband nor the wife were the biological parents of the children.¹⁷⁵ The court went on to note that the *Valle* court used the concept of equitable estoppel to refute the husband's claim that, because the niece and nephew were not "children of the marriage," the trial court lacked jurisdiction to award custody to the wife.¹⁷⁶ *Valle* was denying his paternity, while Michele G. was trying to assert her parental rights and duties. Although recognizing that other states have initiated the use of equitable estoppel to prevent a wife from denying her husband's paternity, the *Nancy S.* court concluded that the doctrine could not be utilized effectively in the instant case. The use of the doctrine in other states has been "rooted in '[o]ne of the strongest presumptions in law (i.e.) that a child born to a married woman is the legitimate child of her husband.'" ¹⁷⁷ Since this presumption did not exist in *Nancy S.*, the court held the doctrine inapplicable to establish parenthood by equitable estoppel.

The court also declined to adopt the doctrine of equitable parenthood and cited the earlier case of *In re Goetz*¹⁷⁸ for support.¹⁷⁹ In *Goetz*, the court specifically declined to extend the reasoning behind the equitable adoption doctrine¹⁸⁰ to an equitable parenthood doctrine that would grant standing to nonparents in child custody battles.¹⁸¹ Although the court acknowledged that the legislature had given "limited

174. *Id.* at 839, 279 Cal. Rptr. at 218.

175. *Id.* at 839 n.6, 279 Cal. Rptr. at 218 n.6.

176. *Id.*

177. *Id.* at 840, 279 Cal. Rptr. at 218 (quoting Brenda J. Runner, *Protecting a Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L. 115, 116 (1989-90)).

178. 203 Cal. App. 3d 514, 250 Cal. Rptr. 30 (1988).

179. *Nancy S.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 218-19 (1991) (citing *Goetz*, 203 Cal. App. at 519-20, 250 Cal. Rptr. at 33). *But cf.* *Sabol v. Bowling*, No. CF 27024 (Cal. Super. Ct., Los Angeles County, Jan. 30, 1989) (allowing a nonparent to proceed to trial under the claim of "parental estoppel"). In *Sabol*, the nonbiological lesbian parent's brother was the sperm donor and therefore she was "biologically related" to the child as an aunt. The superior court did not consider the biological link in allowing her to proceed to trial, but rather based its decision on equitable estoppel grounds. Her request for visitation was later denied on the grounds that the child was too young to have developed significant enough bonds with Sabol to require visitation. *Id.* at 10. See *Judge Denies Woman Custody of Lesbian Ex-Lover's Child*, L.A. TIMES, Dec. 16, 1989, at B3.

180. The doctrine of equitable adoption is recognized in California solely for the purposes of inheritance. See *Goetz*, 203 Cal. App. 3d at 519, 250 Cal. Rptr. at 33; see also *Estate of Radovich*, 48 Cal. 2d 116, 130, 308 P.2d 14, 24 (1957) ("The child does not become, in a legal sense, the child of the adopting parents except for the purpose of receiving title to their property . . .") (Schauer, J., dissenting); *Estate of Wilson*, 111 Cal. App. 3d 242, 244-45, 168 Cal. Rptr. 533, 534 (1980) (holding that equitable adoption doctrine is part of California law and allows an equitably adopted child to inherit by virtue of contract).

181. *Goetz*, 203 Cal. App. 3d at 519, 250 Cal. Rptr. at 33.

recognition" to the equitable parenthood theory by enacting Civil Code section 4531.5,¹⁸² the stepparent visitation statute, the court concluded that there was no indication that the legislature intended to bestow custody rights on stepparents upon marriage dissolution.¹⁸³ The court unequivocally held that this change was the legislature's responsibility.¹⁸⁴

(2) *Other States' Extension of Equitable Estoppel to Equitable Parenthood*

The doctrine of equitable parenthood first was recognized outside of California in the 1987 Michigan case of *Atkinson v. Atkinson*.¹⁸⁵ In *Atkinson* the court held:

[A] husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.¹⁸⁶

After discussing an earlier case in which the husband was estopped from denying parenthood, the *Atkinson* court acknowledged that a logical extension of estoppel was to recognize a nonbiological parent as a parent "when he desires such recognition and is willing to support the child as well as wants the reciprocal rights of custody or visitation afforded to a parent."¹⁸⁷ The court bolstered its new theory by analogizing equitable parenthood to equitable adoption.¹⁸⁸

Before adopting this principle, the *Atkinson* court had to consider whether it had a legal basis for "fashioning" this doctrine.¹⁸⁹ The court determined that the Michigan Child Custody Act was equitable in nature, and that its provisions were to be liberally construed.¹⁹⁰

182. See *supra* notes 104-05 and accompanying text (discussing California Civil Code § 4351.5). Section 4531.5 provides only "limited recognition" to the theory because it allows the stepparent standing to pursue a visitation claim, but not an action for child custody.

183. *Goetz*, 203 Cal. App. 3d at 519, 250 Cal. Rptr. at 33.

184. *Id.* at 520, 250 Cal. Rptr. at 33.

185. 160 Mich. App. 601, 408 N.W.2d 516 (1987); see Rebekah F. Visconti, Note, *The Legal Relationship of a Nonbiological Father to His Child: A Matter of Equity*, 66 U. DET. L. REV. 97, 98 (1988) (discussing extensively the *Atkinson* case and equitable estoppel).

186. *Atkinson*, 160 Mich. App. at 608-09, 408 N.W.2d at 519.

187. *Id.* at 610, 408 N.W.2d at 520.

188. *Id.* at 611, 408 N.W.2d at 520; see also Judith A. Curtis, *Family Law*, 35 WAYNE L. REV. 599, 629-30 (1989) (discussing the reasons the court adopted the equitable parent doctrine).

189. *Atkinson*, 160 Mich. App. at 609, 408 N.W.2d at 519.

190. *Id.*

The California Court of Appeal twice reviewed the *Atkinson* case and its reasoning and twice refused to create a similar doctrine.¹⁹¹ Even if the California courts were to adopt such a theory, it is unlikely that it would successfully overcome the language of Civil Code sections 7001, 7003, and 7015, which jointly restrict the operative definition of legal parent and parentage determination actions to natural or adoptive parents.¹⁹² Since an "equitable parent" does not fit within the above enumerated statutes, she would be prevented from filing a parentage action under the Uniform Parentage Act. Additionally, without an underlying proceeding, the "equitable parent" would not have standing to pursue a child custody action under California Civil Code section 4600.¹⁹³ Furthermore, it is doubtful that the court would give an equitable parent the same rights and benefits as the natural parent. An "equitable parent," therefore, would not be on equal footing with the natural parent and would be burdened with the higher "detriment" standard in order to gain custody of the child.¹⁹⁴

III. Legal Recognition for the Other Mother

Courts and social commentators alike have extended token recognition to diversity, alternative lifestyles, and the movement of the family away from the traditional nuclear model.¹⁹⁵ It is well documented, however, that nontraditional families still lack the legal recognition traditionally associated with the more socially accepted nuclear family.¹⁹⁶ As the New York Court of Appeals recently recognized, in *Braschi v. Stahl As-*

191. See *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 840, 279 Cal. Rptr. 212, 218-19 (1991); *supra* notes 173-185 and accompanying text.

192. See *supra* notes 28-32 and accompanying text.

193. See *supra* notes 33-36 and accompanying text.

194. See *supra* notes 85-87 and accompanying text.

195. See e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 500-06 (1977) (granting constitutional protection beyond nuclear families to extended families); *Moore Shipbuilding Corp. v. Industrial Accident Comm'n*, 185 Cal. 200, 207, 196 P. 257, 259 (1921) ("[Family may] mean different things under different circumstances. The family, for instance, may be . . . a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household.").

One report notes, "It should be the policy of the government and all private institutions to accept diversity as a source of strength in family life which must be considered in planning policy and programs." 2 CALIFORNIA JOINT SELECT TASK FORCE ON THE CHANGING FAMILY, CALIFORNIA COUPLES: RECOGNIZING DIVERSITY AND STRENGTHENING FUNDAMENTAL RELATIONSHIPS, COUPLES WORKGROUP PRELIMINARY REPORT 276 (1988).

196. See *Shapiro & Schultz*, *supra* note 6, at 280-81 (arguing that states must recognize the existence of single-sex families); Myra G. Sencer, Note, *Adoption in the Nontraditional Family—A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191, 195 (1987) (exploring the possibility of recognizing less traditional family units as an alternative to the two-parent family); see also Claudia A. Lewis, Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1790-1803 (1988) (urging court to recognize homosexual marriage and offer legal, social, and economic protections to these family units).

sociates,¹⁹⁷ the definition of family can, and should, be expanded beyond traditional boundaries to reflect the needs of today's society.¹⁹⁸ The existence of single-sex families can no longer be denied, and to continue to ignore their plight will not curtail their continued existence.¹⁹⁹ The desirability of redefining parenthood and moving away from the traditional model of mother and father as the only ideal "parents" is discussed frequently in the family law arena.²⁰⁰ Unfortunately, as illustrated in the above comparison of California's decisional and statutory law with other states' statutory and case law, the theories of de facto parenthood, *in loco parentis*, and equitable parenthood have not received a warm welcome by California courts entertaining custody disputes between a biological parent and nonbiological lesbian parent. The reasons the courts have been unable to extend standing to the nonbiological lesbian parent are two-fold: The language of California Civil Code section 4600 does not independently provide subject matter jurisdiction over such disputes;²⁰¹ and the courts apparently are unwilling to interpret the definition of "parent" as connoting something more than just natural or adoptive parental relationships.²⁰² Additionally, even if the biological mother files an action for declaratory relief, and thus brings her partner before the court, the courts consistently have refused to equate alternative parental theories with legal parenthood.²⁰³ The time has thus arrived for the California legislature to redefine the parent-child relationship and to recognize the nonbiological partner in a same-sex couple as a legal parent.

The California Court of Appeal in both *Curiale v. Reagan*²⁰⁴ and *Nancy S. v. Michele G.*²⁰⁵ asserted that this change is the legislature's

197. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

198. The *Braschi* court observed: "In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is longterm and characterized by an emotional and financial commitment and interdependence." *Id.* at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 789.

199. See *supra* note 6 (discussing increasing numbers of gay couples forming families).

200. See Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882 (1984); Emily C. Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96, 96 (1987); Nancy D. Polikoff, *The Child Does Have Two Mothers: Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459, 462 (1990); Nancy D. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 REV. L. & SOC. CHANGE 907, 911 (1986) [hereinafter Polikoff, *Legal Obstacles*]; Carrie Bashaw, Comment, *Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*, 13 U. PUGET SOUND L. REV. 321, 321 (1990); Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 733 (1986).

201. See *supra* notes 34-36 and accompanying text.

202. See *supra* notes 28-32 and accompanying text.

203. See *supra* note 85 and accompanying text.

204. 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990).

205. 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991).

responsibility: "Given the complex practical, social and constitutional ramifications of the [de facto parent] doctrine, we believe the legislature is better equipped to consider expansion of current California law should it choose to do so."²⁰⁶ In 1982 the legislature handled the "thorny problem of visitation by stepparents" through the enactment of California Civil Code section 4351.5.²⁰⁷ The legislature protected these relationships because of the state's interest in protecting the family.²⁰⁸ In response to the redefinition of what constitutes a family in our changing society, the legislature next must craft a new definition of the parent-child relationship. This must be done to protect these valid parent-child relationships, even though they are not the traditional heterosexual relationships many consider the only proper kind.

The following sections describe two proposals to effectuate the goal of legal recognition for alternative family situations in California: the statutory redefinition of the parent-child relationship, and the enactment of a second parent adoption statute. These recommendations emphasize the need to afford legal and social protection to intentionally created non-traditional families, while avoiding unwarranted outside interference from nonparents and the state.

A. Statutory Redefinition of the Parent-Child Relationship

This Note argues that, under certain circumstances, a nonbiological, unmarried partner in a same-sex relationship is the child's "parent" and should be recognized as such. The author does not advocate, however, an extension of nonparents' standing in general custody proceedings through expansion of California Civil Code section 4600. When redefining the parent-child relationship the legislature must leave section 4600 intact. The legislative intent behind section 4600 protects the family unit from unwarranted outside disruption by nonparents.²⁰⁹

206. *Curiale*, 222 Cal. App. 3d at 1600-01, 272 Cal. Rptr. at 522 (quoting *In re Lewis*, 203 Cal. App. 3d 514, 519-20, 250 Cal. Rptr. 30, 33 (1990)); see also *Nancy S.*, 228 Cal. App. 3d at 841, 279 Cal. Rptr. at 219 (court states it is unwilling to expand definition of parent because of "complex practical, social, and constitutional ramifications"; court prefers to defer "to the legislature in [these] matters"); Polikoff, *Legal Obstacles*, *supra* note 200, at 910-11 ("To protect the status and interests of the unrecognized mother, we should consider both litigation and legislative strategies. . . . In most states legislative change will be the only recourse, an unlikely occurrence at present.").

207. *Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 368-69, 703 P.2d 88, 96-97, 216 Cal. Rptr. 748, 756 (1985) (Bird, C.J., dissenting), *appeal dismissed*, 474 U.S. 1043 (1986).

208. See Richard S. Victor, *When Third Parties Come First—Asserting the Custodial Rights of Nonparents*, 12 FAM. ADVOC. 8, 45 (Fall 1989) ("Currently 15 states [including California, Alaska and Oregon] have specifically established a broad range of custody, visitation, and support rights for stepparents either through legislative enactments or appellate case decisions.")

209. See *White v. Jacobs*, 198 Cal. App. 3d 122, 123, 243 Cal. Rptr. 597, 597 (1988) (holding that in absence of statutory authority, court could not entertain independent action to

The most feasible solution that would not disrupt the statutory scheme of section 4600 is the enactment of a new provision within the Uniform Parentage Act, California Civil Code sections 7000 and 7021. The new provision would allow a nonbiological, unmarried "parent" who has satisfied certain conditions to pursue an action to determine parentage even though no biological or adoptive link connects the child to the "parent." A well-written, narrowly tailored statutory provision would maintain the integrity of section 4600, yet offer an alternative equitable solution to persons such as Curiale who cannot currently pursue an action to seek child custody. The provision would place the lesbian partner on equal footing with the natural or adoptive parent. Such a provision must be concisely written, however, to prevent actions instituted by third parties.²¹⁰

The goal of offering Curiale a cause of action, yet continuing to safeguard the parent-child relationship from unwarranted intrusion by third parties, can be achieved by revising California Civil Code sections 7001 and 7003.²¹¹ Section 7001 prescribes the existing definition of the parent and child relationship.²¹² Section 7003 outlines the current methods of establishing a parent-child relationship by a natural or adoptive parent.²¹³ The addition of the terminology "de facto parent" to the statutory language of section 7001 and the addition of a fourth subsection under section 7003, authorizing a method of establishing a parent-child relationship by a "de facto parent," would expand the definition of legal

order visitation with grandchild by grandparents over objection of child's parent); see also *supra* note 33 (describing legislative intent of CAL. CIV. CODE § 4600).

210. See Polikoff, *Legal Obstacles*, *supra* note 200, at 910 & n.13. Professor Polikoff warns that if protections provided by case law and statutes expand too far, they will backfire against the very group they were meant to help. *Id.* She reiterates the need to avoid conferring psychological parenthood on relatives, friends, or babysitters. *Id.* "The potential for misuse is frightening." *Id.* at 910. Professor Polikoff further expresses her concern regarding the mediators in these disputes: "Conflicts will probably be resolved in our court system according to the cardinal unwritten principle governing custody disputes between lesbian mothers and straight fathers: that mainstream, conventional, non-threatening values are more likely to prevail." *Id.* at 912.

211. See *supra* note 32 and accompanying text.

212. Section 7001 presently reads: "As used in this part, 'parent and child relationship' means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." CAL. CIV. CODE § 7001 (West 1983).

213. Section 7003 presently reads:

The parent and child relationship may be established as follows:

- (1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.
- (2) Between a child and the natural father it may be established under this part.
- (3) Between a child and an adoptive parent it may be established by proof of adoption.

Id. § 7003.

parent beyond natural or adoptive parents to someone in Curiale's or Michele G.'s position.

Under this proposal, California Civil Code section 7001 would read:

As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural, adoptive, or *de facto* parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

The proposed addition to section 7003 would provide an additional means to establish a parent-child relationship. Newly added section 7003(4) would read, "The parent and child relationship may be established as follows: . . . (4) Between a child and a *de facto* parent it may be established by proof of fulfilling the definition of *de facto* parenthood".

These changes would allow the courts to give a new interpretation to the terminology "mother and child relationship" found in California Civil Code section 7015, which provides for an action to determine the existence or nonexistence of a mother and child relationship.²¹⁴ This would require the "parent" to offer proof of her *de facto* status prior to being granted party status. If the relationship is so established, the parent would be recognized and accorded the same rights as a legal parent. As a result, for instance, Curiale would have the opportunity to establish a parent-child relationship in court even though she is not the natural or adoptive parent of her child.

This proposal requires that the legislature define the elements of *de facto* parenthood. The criteria used to determine the existence of such a parent-child relationship should reflect the goals of effectively acknowledging an existing, legally unrecognized relationship and successfully circumscribing the definition of "*de facto* parent" to prevent inclusion of unintended third parties. These factors could be derived from at least three sources: Professor Katherine Bartlett's three-part redefinition of "parenthood,"²¹⁵ the Oregon parent-child statute,²¹⁶ and the definition of equitable parent from the Michigan case of *Atkinson v. Atkinson*.²¹⁷ The definition of *de facto* parent, as referred to in the proposed addition to section 7003, would incorporate principles from all of these sources as evaluative criteria.

Bartlett offers a theory of nonexclusive parenthood that allows recognition of *de facto* parent relationships without terminating the natural parent's rights.²¹⁸ Her major concerns regarding expansion of the definition of parenthood are two-fold: (1) the possibility that a larger number of adults will make claims upon children, and (2) it may foster "uncer-

214. See *supra* text accompanying note 30.

215. Bartlett, *supra* note 200, at 944-51.

216. OR. REV. STAT. § 109.119(4) (1989).

217. 160 Mich. App. 601, 408 N.W.2d 516 (1987).

218. Bartlett, *supra* note 200, at 944.

tain, unfair and unequal" results.²¹⁹ As a deterrent, she recommends that the state should not interfere with intact families and that the "parent" must prove her legal, natural, or psychological parent status prior to being granted party status.²²⁰ The criteria she recommends for determining a psychological parent are: physical custody of the child for at least six months; mutuality (the parent and the child mutually recognize the relationship); and proof that the relationship with the child began with the consent of the child's legal parent.²²¹

The second source that provides assistance in statutorily defining *de facto* parenthood status is the language of Oregon's parent-child statute. Oregon's statutory definition of the "parent-child" relationship is as follows:

a relationship that exists or did exist, in whole or part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.²²²

The *Atkinson* court, in a slightly different way, defined equitable parent in the following terms:

A husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.²²³

It is significant that the *Atkinson* three-part test defining equitable parenthood is prefaced by the terminology "a child born or conceived during the marriage."²²⁴ This language prevents the parent alleging equitable parenthood from claiming a legal bond with children born prior to the relationship. The criterion of mutual acknowledgement of the relationship by parent and child found in Bartlett's three-part test and the Oregon parent-child statute is mirrored in the first prong of the *Atkinson* test. *Atkinson*, however, allows this factor to be satisfied with a showing

219. *Id.* at 945 & n.305.

220. *Id.* at 946.

221. *Id.* at 946-48.

222. ORE REV. STAT. § 109.119(4) (1989).

223. *Atkinson v. Atkinson*, 160 Mich. App. 601, 608-09, 408 N.W.2d 516, 519 (1989).

224. *Id.*

that the child's mother cooperated in the development of the relationship. The second prong of the definition, requiring that the partner desire the rights afforded to a parent, is found neither in Bartlett's construction nor the Oregon parent-child statute. However, this prong would still be satisfied in those cases in the sense that only a partner desiring parental rights will pursue such an action. The last prong, a willingness to pay child support, would also be evidenced by the partner's pursuit of child custody and visitation.

A combination of the above-mentioned elements will provide the maximum protection for a parent-child relationship between a lesbian partner and her nonbiological child. Thus, the California statutory definition of *de facto* parent should contain the following criteria:

- (1) the biological mother and the nonmarital partner must have mutually decided to start a family prior to the child's conception;
- (2) the nonmarital partner and the child must mutually acknowledge a relationship as parent and child;
- (3) the relationship must have been in existence for at least one year prior to the time of filing the action to determine parentage, during which time the nonmarital partner must have had physical custody of the child or resided in the same household as the child; and
- (4) the nonmarital partner must have supplied or otherwise made available to the child food, clothing, shelter, and incidental necessities and provided the child with necessary care, education, and discipline, on a day-to-day basis, through interaction, companionship, interplay, and mutuality that fulfilled the child's psychological needs for a parent as well as the child's physical needs.

These criteria fulfill the objective of recognizing valid, yet unconventional parent-child relationships while preventing unwarranted intrusion from unqualified third parties, such as babysitters and temporary live-in companions. The above definition of *de facto* parent requires that the biological parent and *de facto* parent mutually decide to raise a family together prior to the conception of the child and that the biological parent fully intend to share legal parenthood with the nonmarital partner. This requirement of mutual intent carefully draws a distinction between a *de facto* parent and a live-in companion who merely resides with the biological parent and has established a relationship with the partner's children. The mutual intent requirement thus prevents undue extension of standing to parties with whom the biological parent did not intend to share the status of parent. This distinction is necessary to maintain the integrity of California Civil Code section 4600.

B. Statutory Recognition of Second Parent Adoption

For same-sex couples who form a family after the birth of a child, and therefore fall outside the statutory revision proposed in the preceding section, the enactment of a second parent adoption statute would provide

the best solution to protect the integrity of their family unit.²²⁵ Commentators define second parent adoption as "the adoption of a child by her parent's nonmarital partner, without requiring the first parent to give up any rights or responsibilities to the child."²²⁶ Under such a scheme, the biological parent's intent to confer legal status upon the nonmarital partner is established clearly through her consent to the adoption procedure.

However, traditional adoption statutes typically are unavailable for the purpose of extending legal parental status to a lesbian partner in a same-sex relationship. As one commentator noted:

Adoption statutes customarily envision two sets of circumstances in which adoptions may take place. In the first, where one biological parent has died or consented to the adoption, a stepparent may adopt the child when he or she marries the other biological parent. In this situation, the stepparent simply acquires the legal status of the absent parent. . . . In the second situation, a child can become part of a new family; adoption extinguishes the rights of the biological parents, in order to protect the stability of the new family unit.²²⁷

The first circumstance, stepparent adoption, allows the adoption of a child by the remarried parent's new spouse without affecting the parental rights of that remarried parent.²²⁸ It merely extends parental rights to the new, nonbiological parent.²²⁹ Second parent adoption is similar to stepparent adoption in that the adoption of the child by the biological parent's partner does not affect the parental rights of the biological parent.²³⁰ Another commentator has argued convincingly that second par-

225. *Id.*

226. See Sencer, *supra* note 196 (recognizing that legal rights of the nonbiological partner do not exist and urging recognition of a legal relationship); Zuckerman, *supra* note 200 (proposing second parent adoption as an expansion of conventional adoption law).

227. Zuckerman, *supra* note 200, at 731 n.8; see also Patt, *supra* note 200, at 127 (defining second parent adoption as "an adoption granted to a person who is not the natural parent's spouse in order to protect a child's best interests . . . which does not result in the termination of the natural parent's parental status").

228. Polikoff, *Legal Obstacles*, *supra* note 200, at 911 n.15.

229. See, e.g., CAL. CIV. CODE § 227.10(a) (West 1991) ("Any stepparent desiring to adopt a child of his or her spouse may for that purpose petition the superior court. . . ."); see also Marckwardt v. Superior Court, 150 Cal. App. 3d 471, 198 Cal. Rptr. 41 (1984) (holding that once natural father consented to adoption of his children, he was no longer legal parent and had no standing to request visitation). But cf. CAL. CIV. CODE § 227.44 Section 227.44 provides, in pertinent part:

In a stepparent adoption, the form . . . for the consent of the birth parent shall contain substantially the following notice: "Notice to the parent who gives the child for adoption: If you and your child lived together at any time as parent and child, the adoption of your child by a stepparent does not affect the child's right to inherit your property"

Id.

230. Other issues arise when there is another biological parent. This Note deals specifi-

ent adoption is a natural extension of the legally recognized procedure of stepparent adoption.²³¹

The critical distinction between the two procedures, however, is that stepparent adoption involves marriage and is covered by statutory provisions that do not provide for adoption by unmarried partners.²³² Statutory provisions such as these provide no opportunity for the nonbiological partner in a same-sex couple legally to adopt her partner's child. Stepparent adoption is not a viable solution for same-sex couples because members of the same sex cannot legally marry.²³³

The second typical adoption scenario, in which the adoption extinguishes the rights of the biological parent, is also an inadequate alternative. Few biological parents would want to extinguish their legal rights with regard to their children in order to effectuate an adoption by their nonmarital same-sex partner. Second parent adoption is a particularly promising alternative because it allows same-sex couples to circumvent the restrictions in current state adoption statutes, which provide that one cannot adopt a child unless either the natural parent waives all parental rights²³⁴ or the adopting stepparent is married to the legal parent.²³⁵

cally with situations in which the mother has been artificially inseminated or in which there is no father claiming parental rights.

231. Zuckerman, *supra* note 200, at 733.

232. See, e.g., ALASKA STAT. § 25.23.130 (1983); CAL. CIV. CODE § 227.10 (West 1991); VA. CODE ANN. § 63.1-233 (Michie 1987).

233. See *supra* note 50; see also *Developments in the Law, supra* note 6, at 1605-11 (examining the right of gay and lesbian couples to marry and arguing that state laws prohibiting same-sex marriage are constitutionally invalid).

234. CAL. CIV. CODE § 221.76 (West 1991) ("The birth parents of an adopted child are from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over the child."); see DONNA HITCHENS, LESBIANS CHOOSING MOTHERHOOD: LEGAL ISSUES IN DONOR INSEMINATION § VII (San Francisco Lesbian Rights Project, 1984) (noting that "no state allows an unrelated adult, except in some cases a stepparent, to adopt a child *unless* the natural parent waives all parental rights") (emphasis added). But cf. Patt, *supra* note 200, at 112 ("In most states, statutory language will not expressly prohibit second parent adoptions."). Patt discusses in depth the interpretation and implications of adoption statutes requiring termination of parental rights. *Id.* at 113-21. She points out that the development of stepparent adoption in California was directly related to the court's willingness to waive the requirements of California Civil Code § 229 (now § 221.76). *Id.* at 118. She reports that the state courts of California, Alaska, and Oregon have allowed adoptions by the parent's same-sex partner. *Id.* at 98 n.13, 130-31. In making their decision, the courts have emphasized the child's best interests, rather than the lack of a legal relationship between the two women. *Id.* at 131. See also CURRY & CLIFFORD, *supra* note 10, at 7:39 ("At least two states, . . . Alaska and Oregon, have permitted the co-parent to adopt the child, and two California judges have granted joint adoptions to lesbian couples.").

235. See Patt, *supra* note 200, at 96 (noting that when couples are unable or unwilling to marry, their children lack legal protection, and that a legal alternative is necessary); Polikoff, *Legal Obstacles, supra* note 200, at 911 n.15 ("Lesbians cannot legally marry, and thus cannot take advantage of the statutory provisions for stepparent adoption").

In California, a few second parent adoptions have been granted, although not under the express terminology of "second parent adoption."²³⁶ The courts have waived California Civil Code section 221.76 (formerly section 229),²³⁷ in certain circumstances, by focusing on the child's best interests rather than the marital or legal status of the adopting couple.²³⁸ However, this waiver depends on the individual determination of the judge overseeing the adoption.²³⁹

This ad hoc method of waiving section 221.76 appears arbitrary and may not promote consistent results. Enactment of a second parent adoption statute in California allowing the nonmarital partner to adopt a child without extinguishing the rights of the natural or adoptive parent would be a more reliable alternative. One author, noting that the best interests of the child "often come under biased scrutiny," has proposed an amendment to the Model State Adoption Act to prevent judges from denying the existence of second parent adoption for lack of legislative authority.²⁴⁰ A similar amendment is necessary in California to prevent courts from denying the existence of such adoptions for lack of legislative authority and to ensure consistent and unbiased results.²⁴¹

236. See *In re N.L.D.*, No. 17945 (Cal. Super. Ct., San Francisco County, Feb. 24, 1986); see also *In re D.J.L.*, No. A-28345 (Cal. Super. Ct., San Diego County, Apr. 17, 1984) (adoption by unmarried heterosexual partner of the parent); Patt, *supra* note 200, at 98 & n.13 (citing *In re N.*, No. 18086 (Cal. Super. Ct., San Francisco County, May 11, 1986) (adoption by parent's same-sex partner)); Bashaw, *supra* note 200, at 325-26 & nn.18-27 (citing adoptions in Oregon, Alaska, California and Washington); Zuckerman, *supra* note 200, at 741 n.66 (citing Alaska, New Jersey and Oregon second parent adoption cases).

237. See CAL. CIV. CODE § 221.76 (West 1991); *supra* note 236.

238. Patt, *supra* note 200, at 114-15 & n.111.

239. Further information regarding second parent adoption cases and criteria is not available for publication but is available for personal research from the National Center for Lesbian Rights, 1370 Mission Street, Fourth Floor, San Francisco, California, 94102.

240. Elizabeth Zuckerman, in her comment, proposes a legislative amendment to the Model State Adoption Act, which reads in pertinent part:

Any person may, according to the provisions of this Act, adopt his or her nonmarital partner's child, without requiring the existing legal parent to relinquish his or her rights and responsibilities, except that:

(a) Before the filing of the petition for adoption, the adoptee must have resided for a period of one (1) year with petitioner, unless this filing provision is waived by the court for good cause shown

Zuckerman, *supra* note 200, at 758 n.173.

241. In approaching this task, it must be remembered that "[n]o amendment can or should deprive judges of their discretion in adoption proceedings. The best interests determination must remain open-ended to protect parents and children from inflexible rules." *Id.* A second parent adoption statute will not curtail the discretion of family law judges. It will, however, prevent arbitrary discrimination against same-sex couples that results from the current practice of ad hoc waiver of § 221.76.

IV. Conclusion

Because California's current statutory definition of the parent-child relationship recognizes only natural and adoptive parents as legal parents, the nonbiological or nonadoptive lesbian parent is restricted in two ways. She is unable to pursue a child custody or visitation action because she lacks standing. And were the legal parent to bring her into family court, she still would be unable to seek parental rights on the same footing as the natural or adoptive parent. These statutory limitations lead to an unfair result when the couple has mutually decided to raise a family together prior to the birth of any children. Same-sex couples experience another statutory barrier when, after the birth of a child by one, they wish the other to legally adopt that child. In California, a nonmarital partner currently is unable to adopt her partner's child without extinguishing the partner's rights as the natural or adoptive parent. Because same-sex couples cannot legally marry in California, the statutory scheme makes it impossible for these nonbiological and nonadoptive parents to attain the status of legal parent of a child they have raised together with the biological mother since the child's birth.

Statutory redefinition of the parent-child relationship and the enactment of a second parent adoption statute would provide nonbiological parents in lesbian relationships with the legal recognition necessary to protect the integrity of their families. Redefinition of the parent-child relationship should include a narrowly tailored provision defining *de facto* parenthood, and a method for establishing a *de facto* parent-child relationship. Enactment of a second parent adoption statute would provide a legitimate method for partners in same-sex couples to adopt each other's children without extinguishing the rights of the natural or adoptive parent. Working in combination, these two proposed statutes would offer legal recognition to same-sex families and thereby allow both parents to protect their relationship with their children.